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24 CFR Parts 903, 905, 941 et al.
Public Housing Capital Fund Program; Proposed Rule

DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT**24 CFR Parts 903, 905, 941, 968, 969****[Docket No. FR-5236-P-01]****RIN-2577-AC50****Public Housing Capital Fund Program****AGENCY:** Office of the Assistant Secretary for Public and Indian Housing, HUD.**ACTION:** Proposed rule.

SUMMARY: This proposed rule combines and streamlines the former legacy public housing modernization programs, including the Comprehensive Grant Program (CGP), the Comprehensive Improvement Assistance Program (CIAP), and the Public Housing Development Program (which encompasses mixed-finance development), into the Capital Fund Program (CFP). This rule proposes a change to the Public Housing Agency Annual Plan regulation to incorporate the definition of qualified public housing agencies (PHAs), which was mandated by the Housing and Economic Recovery Act (HERA) of 2008, and to decouple or separate the CFP informational requirements from the PHA Annual Plan requirements. Also proposed is the ability for PHAs to request a total development cost (TDC) exception for integrated utility management, capital planning, and other capital and management activities that maximize energy conservation and efficiency, including green construction and retrofits, which include windows; heating system replacements; wall insulation; site-based generation; advanced energy savings technologies, including renewable energy generation; and other such retrofits.

The structure of the proposed Public Housing Capital Fund Program regulation is described in section IV of the **SUPPLEMENTARY INFORMATION**. Several regulations would be eliminated with the implementation of this rule, along with the issuance of new and/or revised CFP forms, including the CFP Annual Statement/Performance and Evaluation Report (form HUD-50075.1), CFP 5-Year Action Plan (form HUD-50075.2), and the CFP Annual Contributions Contract (ACC) Amendment, as well as a new guidebook.

DATES: Comments Due Date: April 8, 2011.**ADDRESSES:** Interested persons are invited to submit comments regarding this proposed rule to the Regulations

Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street, SW., Room 10276, Washington, DC 20410-0500. Communications must refer to the above docket number and title. There are two methods for submitting public comments. All submissions must refer to the above docket number and title.

1. Submission of Comments by Mail. Comments may be submitted by mail to the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street, SW., Room 10276, Washington, DC 20410-0500.

2. Electronic Submission of Comments. Interested persons may submit comments electronically through the Federal eRulemaking Portal at <http://www.regulations.gov>. HUD strongly encourages commenters to submit comments electronically. Electronic submission of comments allows the commenter maximum time to prepare and submit a comment, ensures timely receipt by HUD, and enables HUD to make them immediately available to the public. Comments submitted electronically through the <http://www.regulations.gov> Web site can be viewed by other commenters and interested members of the public. Commenters should follow the instructions provided on that site to submit comments electronically.

Note: To receive consideration as public comments, comments must be submitted through one of the two methods specified above. Again, all submissions must refer to the docket number and title of the rule.

No Facsimile Comments. Facsimile (FAX) comments are not acceptable.

Public Inspection of Public Comments. All properly submitted comments and communications submitted to HUD will be available for public inspection and copying between 8 a.m. and 5 p.m. weekdays at the above address. Due to security measures at the HUD Headquarters building, an advance appointment to review the public comments must be scheduled by calling the Regulations Division at 202-402-3055 (this is not a toll-free number). Individuals with speech or hearing impairments may access this number via TTY by calling the Federal Information Relay Service, toll free, at 800-877-8339. Copies of all comments submitted are available for inspection and downloading at <http://www.regulations.gov>.

FOR FURTHER INFORMATION CONTACT: Jeffrey Riddel, Director, Office of Capital Improvements, Office of Public and Indian Housing, Department of Housing and Urban Development, 451 7th Street,

SW., Washington, DC 20410-8000; telephone number 202-708-1640 (this is not a toll-free number). Hearing- or speech-impaired individuals may access this number through TTY by calling the toll-free Federal Information Relay Service at 800-877-8339.

SUPPLEMENTARY INFORMATION:**I. Background**

Section 9(d) of the U.S. Housing Act of 1937 (1937 Act) (42 U.S.C. 1437g(d)) provides for a "Capital Fund" for the purpose of making assistance available to PHAs to carry out capital and management improvement activities. Section 9(d)(2) of the 1937 Act (42 U.S.C. 1437g(d)(2)) requires HUD to develop a formula for determining the amount of assistance provided to PHAs from the Capital Fund for a federal fiscal year (FFY). The formula "shall include" a mechanism to reward PHA performance. As required by statute, the Capital Fund formula (CF formula) was developed through negotiated rulemaking and promulgated through a final rule, published on March 16, 2000 (65 FR 14422), with certain minor amendments to remove some incorrect, unnecessary dates adopted by final rule published on May 2, 2000 (65 FR 25446).

Section 9(g) of the 1937 Act (42 U.S.C. 1437g(g)) provides for a certain amount of flexibility in the use of Capital Fund amounts. For PHAs other than small PHAs (that is, those with fewer than 250 units of public housing), a PHA may use up to 20 percent of its Capital Fund for activities that are eligible activities for the Operating Fund under section 9(e) of the 1937 Act (42 U.S.C. 1437g(e)). Small PHAs that meet certain statutory criteria related to operating and maintaining their public housing in safe, clean, and healthy condition may use 100 percent of their Capital Fund amounts for any statutorily eligible use under the Operating Fund.

Section 9(g)(3) of the 1937 Act (42 U.S.C. 1437g(g)(3)) imposes limitations on the use of the Capital Fund or Operating Fund for new construction. Generally, the CF formula shall not provide PHAs funding for the purpose of constructing public housing units (which includes acquisition), if the construction would result in a net increase from the number of housing units owned, operated, or assisted by the PHA on October 1, 1999. PHAs may use their CF formula amounts to construct units in excess of the "net increase" limitation, if the units are available and affordable to low-income families (42 U.S.C. 1437g(g)(3)(B)). The 1937 Act provides two exceptions to the "net increase" limitation on the CF

formula. One is where the funding for additional units is for a mixed-finance project (42 U.S.C. 1437g(g)(3)(C)(i)). The second exception is where the cost of the useful life of the project is less than the estimated cost of providing tenant-based assistance under the Housing Choice Voucher program (42 U.S.C. 1437g(g)(3)(C)(ii)).

Section 9(j) of the 1937 Act (42 U.S.C. 1437g(j)) provides for penalties for slow obligation and expenditure of Capital Funds. Generally, a PHA is required to obligate funds received under section 9 of the 1937 Act within 24 months of the date on which the funds become available or within 24 months of the date on which the PHA accumulates enough funds to undertake modernization, substantial rehabilitation, or construction of units (42 U.S.C. 1437g(j)(1)). Under section 9(j)(2)(B) of the 1937 Act (42 U.S.C. 1437g(j)(2)(B)), a PHA “shall disregard” this requirement with respect to unobligated amounts the total of which do not exceed 10 percent of the original allocation of Capital Funds to the PHA. Additionally, PHAs must expend their Capital Fund assistance within 4 years after the date on which the funds became available for obligation (42 U.S.C. 1437g(j)(5)). HUD may extend the time periods for obligation of Capital Funds for specific reasons listed in the statute and established by HUD by notice published in the **Federal Register** (42 U.S.C. 1437g(j)(2), 42 U.S.C. 1437g(j)(5)(A)). The statute lists potential sanctions for failure to comply with the obligation and expenditure deadlines, including withholding of funds, penalties applied to future grants, reallocation of funds to high-performing PHAs, and recapture (42 U.S.C. 1437g(j)(3), 42 U.S.C. 1437g(j)(6)). Regulations implementing the obligation and expenditure requirements were published on August 1, 2003 (68 FR 45731). These regulations are currently codified at 24 CFR 905.120, and would be moved to § 905.306 by this proposed rulemaking.

Former section 9(k) of the 1937 Act (42 U.S.C. 1437g(k)) provided for a fund reserve for emergency, natural disasters, and litigation needs, and for a set-aside for Operation Safe Home. Section 2804 of Title VII (Small Public Housing Authorities Paperwork Reduction Act) of Division B of the HERA (Pub. L. 110–289, approved July 30, 2008) removed section 9(k) of the 1937 Act.

Section 2702 of the Small Public Housing Authorities Paperwork Reduction Act amends section 5A of the 1937 Act (42 U.S.C. 1437c–1), to provide that certain PHAs, called “qualified public housing agencies,” are

not required to file the PHA Annual Plan called for in section 5A(b)(1) of the 1937 Act (42 U.S.C. 1437c–1(b)(1)). Qualified PHAs under section 2702 are those that administer 550 or fewer units—considered as the sum of all the public housing units and vouchers under section 8(o) of the 1937 Act (42 U.S.C. 1437f(o)) administered by a PHA—and are not designated as a troubled PHA under section 6(j)(2), and do not have a failing score under the Section 8 Management Assessment Program (SEMAP) during the prior 12 months.

Such PHAs must still submit a PHA 5-Year Plan, file the civil rights certification under 42 U.S.C. 1437c–1(d)(16), and consult with, and consider the recommendations of, the resident advisory board at the annual hearing required of such agencies regarding any changes to the goals, objectives, and policies of that PHA. The CFP (and previous CIAP and CGP) have always had separate informational requirements, but some of these were combined with the PHA Annual and 5-Year Plan. However, with the changes made to the PHA Annual Plan and the need to have grant reporting in compliance with CFP and other federal reporting requirements, the CFP informational requirements will be decoupled or separated from the PHA Annual Plan submissions.

II. Overview of the Capital Fund Program

This rule proposes to revise the regulations governing the use of assistance made available under the Capital Fund in 24 CFR part 905. Assistance under the Capital Fund is a primary, regular source of funding made available by HUD to a PHA for modernization and development of public housing and other capital activities. This rule also proposes to replace and remove several other regulations that currently govern a PHA’s use of HUD assistance, specifically: 24 CFR part 941, entitled “Public Housing Development”; 24 CFR part 968, entitled “Public Housing Modernization”; and 24 CFR part 969, entitled “PHA-Owned Projects—Continued Operation as Low-Income Housing After Completion of Debt Service.” In the case of part 969, which provides for the continued operation of housing as public housing for the 10-year period after the last receipt of operating subsidy, sections 9(e)(3) and 9(m) of the 1937 Act, along with the Annual Contributions Contract (ACC), as amended and approved by HUD, serve the same purpose, making the

separate regulations in 24 CFR part 969 no longer necessary.

Although HUD established the CF formula in 2000, HUD continued to rely on CFP requirements found in the regulations in these other parts of 24 CFR, to the extent that these requirements were not superseded by statutory requirements.

III. Overview of the Changes to the PHA Annual Plan

This regulation modifies 24 CFR 903.3(a) to incorporate the definition of a qualified PHA provided in section 2702 of HERA. HERA exempts qualified PHAs from the requirement of section 5(A) of the 1937 Act to submit a PHA Annual Plan.

IV. This Proposed Rule

To meet the objective of revising and consolidating the requirements governing the use of Capital Funds, as discussed in Section II of this preamble, this proposed rule would revise 24 CFR part 905 to establish new subparts A through H.

A. Subpart A

Subpart A of this proposed part 905 would provide a general introduction and definitions. Section 905.100(a) and (b) would state the purpose of the part 905 regulations and provide a general description of the CFP. Section 905.100(c) would establish employment, contracting, and close-out requirements. Section 905.102 would address the applicability of the part 905 regulations. Section 905.104 would require that all HUD approvals be in writing from officials designated to grant such approvals. Section 905.106 would state that noncompliance with this part or any other applicable requirements may subject a PHA and its partners to sanctions provided elsewhere in part 905. Section 905.108 would provide a number of program-specific definitions.

The following are definitions relating to the Capital Fund Program and proposed to be included in the definition section of the part 905 regulations: “Additional Project Costs,” “Accessible,” “Capital Fund,” “Capital Fund Annual Contributions Contract Amendment (CF ACC Amendment),” “Capital Fund Program Fee,” “Community Renewal Costs,” “Cooperation Agreement,” “Date of Full Availability (DOFA),” “Emergency Work,” “Expenditure,” “Federal Fiscal Year (FFY),” “Force Account Labor,” “Fungibility,” “Housing Construction Cost (HCC),” “Line of Credit Control system (LOCCS),” “Mixed Finance Modernization,” “Natural Disaster,” “Obligation,” “Open Grant,” “Operating

Fund,” “PIH Information Center (PIC),” “Public Housing Agency (PHA),” “Public Housing Project,” “Public Housing Assessment System (PHAS),” “Public Housing Development,” “Public Housing Requirements,” “Reasonable Cost,” “Reconfiguration,” and “Uniform Federal Accessibility Standards (UFAS).” Other definitions specifically related to public housing development are proposed to be placed in subpart F, which will address development activities.

“Capital Fund Program Fee” is defined as the amount up to 10 percent of the annual Capital Fund grant under this regulation that may be set aside for administrative costs for an asset management PHA. These costs are associated with the Central Office Cost Center’s (COCC) oversight and management of the CFP. These costs include duties related to general capital planning, preparing of the Annual Plan, processing of LOCCS, preparing reports, drawing of funds, budgeting, accounting, and procuring of construction and other miscellaneous contracts.

PHAs that have not converted to asset management may expend up to 10 percent of the Capital Fund grant on their administrative costs. Administrative costs exclude any costs related to lead-based paint or asbestos testing, in-house architectural or engineering work, or special administrative costs required under state or local law, unless approved by HUD.

“Reasonable cost” is defined in the regulation as “An amount to rehabilitate or modernize an existing structure that is not greater than 90 percent of the TDC for a new development of the same structure type, number and size of units in the same market area.” Section 905.314(g), modernization cost limits, states that a PHA is prohibited from modernizing an existing public housing development that cannot be modernized for 90 percent of TDC. The Office of Public Housing uses other cost limitation standards for voluntary conversion and for Section 18 demolition. For mandatory conversion (24 CFR part 972 subpart B), which relates to developments of 250 or more dwelling units with a significant (15 percent) vacancy rate over 3 years, the cost standard is whether it is more expensive to operate the development as public housing than to provide tenant based assistance. For 24 CFR part 970, the description of major problems indicative of obsolescence includes a cost standard of 62 percent of TDC for elevator structure and 57.14 percent of TDC for all other types of structures.

HUD is requesting that the public consider these varying cost limitations and provide the Department with comments on whether the standard of 90 percent of TDC, which is incorporated in this proposed rulemaking, is the best cost limitation to use for the modernization of existing public housing.

B. Subpart B

Subpart B would describe Capital Fund eligible activities and ineligible activities. Section 905.200 lists the eligible costs, which include, but are not limited to, development, financing, and modernization of public housing projects; capital planning; preparation of the annual statement; vacancy reduction; making units and common areas accessible; nonroutine maintenance; resident self sufficiency, security and safety; relocation and mobility counseling; costs for approved homeownership programs; conduct of an energy audit when there are not sufficient operating funds and the energy audit is part of a new modernization program for energy efficiency, including the use of Energy Star items; certain administrative costs; monitoring of LOCCS; the preparation of reports; the new Capital Fund program fee that can be attributed to the Central Office Cost Center; and emergency activities.

This proposed rule would incorporate energy standards at §§ 905.200(b)(6)(ii), 905.200(b)(14), 905.312(b)(1), 905.312(c)(3), 905.312(d), 905.314(c), and 905.316(e). The standards include those in 42 U.S.C. 12709 as amended by section 153 of the Energy Policy Act of 2005, Public Law 109–58 (these standards include the 2006 International Energy Conservation Code and ASHRAE 90.1–2004), and the Energy Star requirement for appliances in section 152 of the Energy Policy Act of 2005. In addition, § 905.200(b)(14) of this proposed rule incorporates energy efficiency standards from 42 U.S.C. 1437g(d)(1)(K), as added by section 151 of the Energy Policy Act of 2005, which makes it an eligible use of the capital fund to increase energy efficiency by such means as the Secretary of HUD determines are appropriate. Public comment is sought as to how energy efficiency should be measured, as well as what specific uses of the Capital Fund would increase energy efficiency.

Since HERA removed the authorization of the emergency set-aside under section 9(k) of the 1937 Act (42 U.S.C. 1437g(k)), this proposed rule would remove the regulatory provisions related to section 9(k).

Proposed § 905.202 would list the activities and costs that would be ineligible under the CFP. These include, but are not limited to, costs not included in the PHA’s CFP 5-Year Action Plan; luxury items such as amenities beyond what is customary in the community; costs that would be eligible but for the fact that they are in excess of the amount directly attributable to the public housing units, when the physical or management improvement will benefit programs other than public housing; direct provision of social services; costs that are funded by another source, so there would be duplicate funding; and any other costs that HUD may determine on a case-by-case basis.

Proposed § 905.204 would include regulations on funding for emergencies and natural disasters. Under this section, HUD will look to ensure, in both situations, that a PHA uses other legally available funds, including unobligated Capital Funds, before using funds from the set-aside for disasters and emergencies. Disasters and emergencies are, however, by nature unexpected and unpredictable, so it is also necessary for HUD to exercise case-by-case discretion to ensure that disaster needs and other housing needs of the PHA’s residents are and will continue to be met. It should be noted that both HUD’s 2009 (Title II, Pub. L. 111–8) and 2010 (Division A, Title II, Pub. L. 111–117) Appropriations Acts made a limited amount of Capital Funds available for emergencies and natural disasters, and specifically excluded Capital Funds from being used for Presidentially declared disasters under the Stafford Act (42 U.S.C. 5121 *et seq.*). See also PIH Notice 2010–14, available at <http://www.hud.gov/offices/pih/publications/notices/10/pih2010-14.pdf>.

Former § 905.10(b), Emergency Reserve and Use of Amounts, would be removed from the proposed rule. The Capital Fund formula, which was previously found in § 905.10, is in § 905.400 of this proposed rulemaking. However, this proposed rule retains the procedures for awarding emergency and natural disaster grants, if provision is made for a set-aside for emergencies and natural disasters in an annual Appropriations Act.

C. Subpart C

Subpart C of this proposed rule would include the CFP requirements found in 24 CFR part 968 (public housing modernization) and 24 CFR 905.120 (penalties for slow expenditure or obligation of Capital Funds), as those sections are codified as of the date of this proposed rule. This rule would

establish CFP submission requirements for both qualified and nonqualified PHAs, as defined in Title VII of HERA section 2702. Submission requirements include, but are not limited to, the Physical Needs Assessment (PNA), the budget, and various certifications.

The new requirement for project-based PNAs for all properties in the PHA's inventory is intended to support effective property-based planning and the transition to asset management. Completion of the PNA will provide PHAs with critical information on the physical condition of each project in its inventory and assist the PHAs to identify and prioritize work items in the Annual Statement and the 5-Year Action Plan. The proposed rule would require that the PNA be completed by the PHA and be submitted to the Field Office at a time required by HUD.

The proposed rule would require that the other CFP submission requirements, including the budget and the certifications, be submitted in a format prescribed by HUD at the time that the PHA submits its signed CFP ACC Amendment for its CFP grant(s). Except in the case of emergency work, the PHA shall not spend Capital Funds on any work that is not included in an approved CFP 5-Year Action Plan and any approved amendments. Proposed § 905.300(b)(5) describes HUD review of the CFP submissions for compliance with the public housing program requirements. The PHA's budget must be approved by the PHA's Board of Commissioners, but does not require HUD approval. The CFP 5-Year Action Plan, which is a component of the 5-Year Plan required under part 903, continues to be required for all PHAs, both qualified and nonqualified.

Proposed § 905.300(b)(8) would address performance and evaluation reports. Proposed § 905.300(b)(4) would govern other formal requirements for qualified and nonqualified PHAs, such as the requirement that the PHA consult with the Resident Advisory Board(s) and conduct annual public hearings.

Proposed § 905.302 would require PHAs to submit the CF ACC Amendment by a specified date. Late submittal does not affect a PHA's requirement to obligate and expend its Capital Fund by the dates established by HUD. If HUD does not receive the signed and dated CF ACC Amendment by the submission deadline, the PHA will receive the Capital Fund grant for that year; however, the PHA will have less than 24 months to obligate 90 percent of the Capital Fund grant and less than 48 months to expend those funds, because the PHA's obligation start date and disbursement end date for

these grants will remain as previously established by HUD.

Proposed § 905.304 requires public housing developed or modernized with Capital Funds to be operated in accordance with the CF ACC Amendment. Under proposed § 905.304(a)(1), projects developed with Capital Funds must have a covenant requiring them to be operated as public housing for a 40-year period beginning on the date on which the project becomes available for occupancy, as required by section 9(d)(3)(A) of the 1937 Act (42 U.S.C. 1437g(d)(3)(A)). Under proposed § 905.304(a)(2), projects modernized with Capital Funds will have an additional use restriction for a 20-year period that begins on the latest date that modernization is completed, as required by section 9(d)(3)(B) of the 1937 Act (42 U.S.C. 1437g(d)(3)(B)). Under proposed § 905.304(a)(3), projects developed that receive Operating Fund assistance shall generally have a covenant to operate under requirements applicable to public housing for a 10-year period beginning upon the conclusion of the fiscal year for which such amounts were provided. In accordance with the ACC, existing Declarations of Trust, and section 30 of the 1937 Act (42 U.S.C. 1437z-2), proposed § 905.304(b) imposes a HUD approval requirement on any potential liens or security interests in public housing assets.

The requirements for obligation and expenditure of Capital Funds would be in proposed § 905.306. These requirements include the statutory time limits on expenditure found in section 9(j) of the 1937 Act (42 U.S.C. 1437g(j)), as well as penalties for failure to obligate Capital Funds in a timely manner. This section also provides information on the criteria for requesting an extension to the obligation deadline.

Section 905.308 would list federal requirements applicable to all Capital Fund modernization, development, and financing activities, including, but not limited to, relocation of residents, wage rates, environmental requirements, section 504 compliance, and lead-based paint poisoning prevention.

Proposed § 905.310 would require that the PHA initiate a fund requisition from HUD only when the funds are due and payable, unless HUD authorizes another method of payment of such advances, which includes working capital advances, or reimbursement as authorized by 24 CFR 85.21.

Proposed § 905.312 would incorporate the design and construction requirements, which are currently found in 24 CFR 941.203. The standards in

proposed § 905.312(a) are similar to those in currently codified 24 CFR 941.203(a), with the primary difference being that the proposed § 905.312 would require structures "to be consistent with" the neighborhoods they occupy, rather than requiring them to "improve or harmonize with" the neighborhoods.

Additionally, proposed § 905.312, like currently codified § 941.203(b), would require that all development comply with a national building code in addition to the applicable state and local laws, codes, ordinances, and regulations. The proposed rule also specifically addresses accessibility requirements among the federal requirements with which compliance is required at proposed § 905.312(b)(4). The proposed rule would apply design and construction standards to modernization, as well as to development, in proposed § 905.312(c).

In § 905.312(c)(3), HUD refers to including cost-effective energy conservation measures as identified in the PHA's most recent updated energy audit in the design, rehabilitation and construction of public housing development. The Department is seeking public comment, particularly from PHAs, on what cost-effectiveness test(s) should be used when deciding whether an energy conservation measure identified in the energy audit should be implemented or not. Issues for public comment include but are not limited to the following:

(1) The measurement basis for cost effectiveness; *i.e.*, whether to use the total cost of the energy improvement versus the incremental cost of the energy improvement;

(2) Are opportunity costs figured into this calculation (*e.g.*, the incremental cost of the energy improvement versus the cost of various alternative uses of the money);

(3) Do such calculations include any expected increase in energy costs; and

(4) The period of time over which the cost of the improvement would be realized, such as the manufacturer's estimated useful life versus actual time in service.

Your comments will assist HUD to develop important guidance to PHAs that will assist them in determining the most cost-effective energy conservation measures to fund from among the many identified in the PHAs' respective energy audits.

Proposed § 905.314 establishes cost limits for public housing projects, including details about how the TDC and housing construction cost (HCC) limits are calculated. Modernization costs are limited to 90 percent of the TDC; if modernization costs exceed that

limit, the project will not be modernized. Also proposed in § 905.314(c)(1) is the ability for PHAs to request a TDC exception for integrated utility management, capital planning, and other capital and management activities that maximize energy conservation and efficiency, including green construction and retrofits, which include windows; heating system replacements; wall insulation; site-based generation; advanced energy savings technologies, including renewable energy generation; and other such retrofits. HUD has the statutory authority to grant such a TDC exception pursuant to 42 U.S.C. 1437d(b).

For TDC exceptions for integrated utility management, capital planning, and other capital and management activities that maximize energy conservation and efficiency identified in § 905.314(c)(1), the Department will require that the requesting PHA submit a detailed list of the planned energy conservation improvements, an explanation and justification for the proposed energy conservation improvements, and the estimated costs for HUD review. In addition, PHAs requesting an exception of the TDC will be required to submit to HUD an independent cost certification from a third party such as a licensed accredited architect. These materials will be reviewed by HUD and approved on a case-by-case basis. The Department is seeking public comment on what cost effectiveness test(s) HUD should apply when reviewing TDC requests for this exception.

Proposed § 905.314(h) sets administrative cost limits for modernization at 10 percent of the annual Capital Fund grant, excluding costs related to lead-based paint or asbestos testing, in-house architectural or engineering work, or other special administrative costs, unless approved by HUD. Proposed § 905.314(h) sets the administrative cost limits for development work with Capital Fund and RHF grants at 3 percent of the total project budget or, with HUD's approval, up to 6 percent of the total project budget. For a PHA that is under asset management, this administrative cost limit of 10 percent includes the Capital Fund Program fee. This limitation reflects the priority HUD places on use of the Capital Fund for development and modernization.

Proposed § 905.314(j) proposes to reduce the threshold for management improvements from 20 percent to 10 percent over a 3-year period. Under the current CFP a large housing authority (a PHA with 250 or more units in management) could use as much as 50

percent of a Capital Fund (CF) formula grant (*i.e.*, 20 percent for management improvements, 10 percent for administrative costs, and up to 20 percent for operations) for costs not associated with physical improvements of the development. The Department will not be able to fund the estimated modernization needs (as determined in the Capital Needs of the Public Housing Stock in 1998: Formula Capital Study) if such a high percentage of the Capital Fund appropriation is used for purposes other than modernization or development of public housing units. When CGP was established more than 20 years ago, the Department established a threshold to allow for 20 percent of the Capital Fund grant to be used to fund resident activities and other administrative expenses needed to support the physical improvements funded by the modernization program. Since the initiation of the CIAP and CGP, other programs such as the Resident Opportunities and Supportive Services (ROSS) program and Community and Supportive Services, a component of the HOPE VI program, have been established to fund services that enable residents to become self sufficient and/or improve their quality of life. In addition to these programs, section 9(g) of the 1937 Act (42 U.S.C. 1437g(g)) allows large PHAs to use up to 20 percent of a Capital Fund grant for operating costs, while small PHAs have complete flexibility to use their entire Capital Fund grant for operating costs (§ 905.314(l) of this proposed rule). With this flexibility to use Capital Fund for operations, it is no longer necessary to have such a high threshold for funding management improvements.

Proposed § 905.314(k) covers resident management corporation (RMC) activities. RMCs are authorized under section 20 of the 1937 Act (42 U.S.C. 1437r). Under section 20(c) of the 1937 Act (42 U.S.C. 1437r(c)), a PHA may provide a portion of its Capital Funds to an RMC for the purpose of performing eligible activities (under certain conditions, RMCs can be directly funded without going through the PHA (see 42 U.S.C. 1437r(e))). The proposed rule would provide that the PHA will not retain any of the Capital Funds unless the PHA contractually agrees to do so with the RMC.

Proposed § 905.314(j) provides for the HUD-approved use of force account labor. High-performing PHAs would not require HUD approval for this purpose.

Proposed § 905.316 of the proposed rule establishes contracting requirements. This section generally requires compliance with 24 CFR 85.36. Proposed § 905.316(d) requires that,

notwithstanding the bonding requirements of 24 CFR 85.36(h), for each contract over \$100,000, the contractor shall provide a bid guarantee equivalent to 5 percent of the bid price plus one of five acceptable forms of bond listed.

Section 905.318 of the proposed rule would require the PHA to obtain a title insurance policy before taking title to any and all sites and properties acquired with Capital Funds. Section 905.318 also would require recordation of the deed as prescribed by HUD.

Proposed § 905.320 would impose contract administration duties on the PHA for work performed using Capital Funds. The PHA must inspect the work and determine when it is acceptable, and shall pay a contractor only for work that the PHA has inspected and accepted.

Proposed § 905.322 would require that the fiscal closeout of a Capital Fund project requires the submission of a cost certificate; and an audit, if applicable. Proposed § 905.322 also would require the submission of a performance and evaluation (P&E) report that describes the progress on open Capital Fund grants, which is currently required by 24 CFR 968.330. If the PHA does not submit the cost certificate and P&E report in a timely manner as specified in the regulation, HUD may, after notifying the PHA, impose restrictions on the PHA's Capital Fund grants. Proposed § 905.322(c) would provide that the cost certificate is also subject to audit. For PHAs that are exempt from audit, HUD would review and approve the cost certificate based on available information regarding the Capital Fund grant. Proposed § 905.322(e) would provide that all Capital Funds in excess of the actual cost incurred for the grant are subject to recapture.

Proposed § 905.324 would require certain data reporting by PHAs.

Proposed § 905.326 would require PHAs to keep full and complete records of each Capital Fund grant.

D. Subpart D

Subpart D would incorporate, in proposed § 905.400, the regulations that establish the CF formula, currently codified in § 905.10, with the exception of reference to the emergency reserve fund, which was removed by HERA, as discussed above.

The CF formula was initially established by final rule published on March 16, 2000 (65 FR 14422), and that formula is not proposed to be changed by this rule. Terminology would be updated to reflect the change to asset management and project-level accounting. In April 2008, PIC was

realigned to reflect the reorganization of developments into projects. In order to avoid resulting changes in DOFA dates that otherwise could have affected certain PHAs, § 905.400 (d)(6) of this rule proposes to freeze the determination of modernization need as of FFY 2008 and then make adjustments based on changes in inventory. The end result is that there is no substantive change to the formula or the resulting allocation of Capital Funds, and hence the formula, which was originally established through a statutory negotiated rulemaking process, is presented here for the sake of completeness only and not for public comment. However, HUD will accept comment on the aforementioned technical changes reflecting asset management.

Since the Study of the Modernization Needs of the Public and Indian Housing Stock, prepared by Abt Associates Inc., in 1988, the Department has demolished more than 100,000 units of severely distressed public housing and funded a significant amount of modernization in public housing. Subsequently, the Department has already funded 10 years of replacement housing grants for the severely distressed public housing that was removed from the public housing inventory. Section 905.400(j) proposes a transition from a 10-year-long RHF program to a 5-year RHF program for PHAs that remove units from the inventory based on demolition or disposition. The transition to a 5-year RHF program would be effective in FFY 2011 for PHAs that removed units from the inventory in FFY 2010. In FFY 2011, any PHA that began receiving RHF in FFY 2010 based on demolition or disposition that occurred in FFY 2009 and earlier will receive the remainder of its first increment and be eligible for a second increment. Subsequently, PHAs that are already receiving RHF funding in FFY 2011 will not be negatively impacted by the transition because they will receive the total 10 years of RHF funding and will be eligible to receive RHF funding for units removed from inventory for the sale of homeownership as described in § 905.400(j)(1). Also, beginning in FFY 2011, PHAs will be eligible to receive RHF funding for units removed from inventory for the sale of homeownership as described in § 905.400(j)(1) and be allowed to use RHF grants to fund development of either public housing rental or homeownership units. The Department is soliciting comments from PHAs and the PHA interest groups on this proposal to change the RHF funding.

Proposed § 905.400(k) provides for a performance award factor similar to

currently codified § 905.10(j). The provisions of currently codified § 905.10(k) on eligible costs would be moved to proposed § 905.200.

E. Subpart E

Subpart E would address the use of Capital Funds for financing. This subpart is reserved for the regulation entitled "Use of Public Housing Capital and Operating Funds for Financing Activities" that is the subject of a separate rulemaking. (See final rule published on October 21, 2010, at 75 FR 65198.)

F. Subpart F

Subpart F would contain the development requirements, including those related to mixed-finance projects. These requirements would be moved to subpart F from 24 CFR part 941. Program requirements including the limitation on costs and site and neighborhood standards are described in § 905.602. The Department has not made any substantive changes to the site and neighborhood standards found at § 941.202. Definitions specifically related to public housing development are found in § 905.604(b). This subpart also proposes certain deviations from applicable requirements as HUD is permitted to do by regulation in the case of mixed-finance projects under section 35(h) of the 1937 Act, 42 U.S.C. 1437z-7(h). Section 905.604(l), which pertains to closing materials and other documents, and § 905.604(m), which addresses subsidy layering, are reserved to address the revised regulations that are the subject of the rulemaking entitled "Streamlining of Mixed Finance Applications," which was published as a proposed rule in the **Federal Register** on December 27, 2006. Development, with regards to homeownership, will be addressed by a separate rulemaking.

G. Subpart G

Subpart G would state that the PHA may not pledge, mortgage, or enter into a transaction that uses public housing assets without written HUD approval.

H. Subpart H

Subpart H would address PHA compliance with Capital Fund requirements, and HUD review and sanction for noncompliance with HUD contracts and regulations.

V. Findings and Certifications

Paperwork Reduction Act

The information collection requirements contained in this rule have been approved by the Office of Management and Budget (OMB) under the Paperwork Reduction Act of 1995

(44 U.S.C. 3501–3520) and given OMB control numbers 2577–0157 and 2577–0226. In accordance with the Paperwork Reduction Act, an agency may not conduct or sponsor, and a person is not required to respond to, a collection of information, unless the collection displays a currently valid OMB control number.

Regulatory Planning and Review

OMB reviewed this rule under Executive Order 12866 (entitled "Regulatory Planning and Review"). This rule was determined to be a "significant regulatory action" as defined in section 3(f) of the Order (although not an economically significant regulatory action under the Order).

The rule would not have any direct financial impact on the level of funding for the CFP, but has the potential to create some financial transfers among program participants. However, the total amount of transfer is estimated to be less than \$100 million annually.

The rule would gradually phase down the dollar threshold for management improvements, from up to 20 percent to up to 10 percent of a PHA's CF formula grant over a period of 3 fiscal years. On average, PHAs use approximately 8 percent of their Capital Fund grants on management improvements, with many PHAs using considerably less and large PHAs of more than 250 units using 9 percent. In 2008, \$2.38 billion in formula funds were distributed to PHAs. If all PHAs were using the full 20 percent permitted under the current rule, a 10 percent reduction in the management improvement threshold would indicate that about \$238 million would be reprogrammed for other eligible activities and would constitute a transfer from one group of stakeholders that traditionally received management improvement funds, to other CFP eligible activities and stakeholders, without any impact on funding. However, given that the actual rate of usage is below 10 percent, this program requirement would not result in any transfers.

The rule would also phase down the allocation of funds for the RHF from a 10-year RHF to a 5-year RHF. In 2008, a total of 294 PHAs received RHF funds. That year, 251 PHAs funded under the CF formula received \$97,936,944 RHF first increment funding, and 123 PHAs received \$112,825,095 RHF second increment funding. Five years after the implementation of the RHF phase-down, the \$113 million second increment funding would be eliminated and redistributed by formula to all 3,138 eligible PHAs, creating a transfer, but

one only among PHAs. However, HUD has already funded more than 10 years of RHF to assist PHAs that demolished over 100,000 units of severely distressed public housing; thus, the need for RHF has significantly decreased. The phase-down also grandfathers all PHAs that are receiving first- or second-increment RHF as of Fiscal Year (FY) 2010, minimizing the impact.

This rule, if implemented as proposed, would also have significant benefits. This rule updates and consolidates the CFP regulations and related regulations having to do with the use of Capital Funds for development and modernization, as well as regulations for continuing operation of low-income housing after completion of debt service. In addition, the rule proposes to codify recent statutory requirements enacted in HERA. The benefits of the rule such as regulatory consolidation, program clarification, removal of obsolete references, and enhanced efficiencies make the rule necessary. Although HUD established the CF formula in 2000, HUD has continued to rely on CFP requirements to the extent that these requirements were not superseded by statutory requirements.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (2 U.S.C. 1531–1538) (UMRA) establishes requirements for federal agencies to assess the effects of their regulatory actions on state, local, and tribal governments and the private sector. This rule does not impose any federal mandate on any state, local, or tribal government or the private sector within the meaning of UMRA.

Environmental Impact

A Finding of No Significant Impact with respect to the environment has been made in accordance with HUD regulations at 24 CFR part 50, which implement section 102(2)(C) of the National Environmental Policy Act of 1969 (42 U.S.C. 4332(2)(C)). The Finding of No Significant Impact is available for public inspection between the hours of 8 a.m. and 5 p.m. weekdays in the Regulations Division, Office of General Counsel, Department of Housing and Urban Development, 451 7th Street, SW., Room 10276, Washington, DC 20410–0500. Due to security measures at the HUD Headquarters building, an advance appointment to review the docket file must be scheduled by calling the Regulations Division at 202–708–3055 (this is not a toll-free number). Hearing- or speech-impaired individuals may

access this number through TTY by calling the toll-free Federal Information Relay Service at 800–877–8339.

Regulatory Flexibility Act

The Regulatory Flexibility Act (RFA) (5 U.S.C. 601 *et seq.*) generally requires an agency to conduct a regulatory flexibility analysis of any rule subject to notice and comment rulemaking requirements, unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. This rule reflects the transition from PHA-wide accounting to an asset management model, and therefore changes some of the language regarding the CF formula to reflect the new accounting model. The only significant change in the CF formula calculation is a proposal to limit the number of years a PHA is eligible to receive RHF grants to replace units removed from the inventory by demolition, disposition, or homeownership, from 10 years to 5 years. The CF formula amount that is freed up because of fewer RHF grants will cause an increase in the amount of Capital Funds available to the remainder of the PHAs, which includes a large number of small PHAs. Since most small PHAs do not demolish or dispose of a significant number of public housing units, reducing RHF eligibility to 5 years should benefit small PHAs. Therefore, the undersigned certifies that this rule will not have a significant economic impact on a substantial number of small entities, and an initial regulatory flexibility analysis is not required.

Notwithstanding the determination that this rule would not have a significant impact on a substantial number of small entities, HUD specifically invites any comments regarding any less burdensome alternatives to this rule that will meet HUD's objectives as described in this preamble.

Executive Order 13132, Federalism

Executive Order 13132 (entitled “Federalism”) prohibits, to the extent practicable and permitted by law, an agency from promulgating a regulation that has federalism implications and either imposes substantial direct compliance costs on state and local governments and is not required by statute or preempts state law, unless the relevant requirements of section 6 of the Executive Order are met. This rule does not have federalism implications and does not impose substantial direct compliance costs on state and local governments or preempt state law

within the meaning of the Executive Order.

Catalog of Federal Domestic Assistance Number

The Catalog of Federal Domestic Assistance numbers for 24 CFR parts 905, 941, 968, and 969 are 14.850, 14.872, 14.882, 14.883.

List of Subjects

24 CFR Part 903

Administrative practice and procedure, Public housing, Reporting and recordkeeping requirements.

24 CFR Part 905

Grant programs—housing and community development, Public housing, Reporting and recordkeeping requirements.

24 CFR Part 941

Grant programs—housing and community development, Loan programs—housing and community development, Public housing.

24 CFR Part 968

Grant programs—housing and community development, Loan programs—housing and community development, Public housing, Reporting and recordkeeping requirements.

24 CFR Part 969

Grant programs—housing and community development, Low and moderate income housing, Public housing.

Accordingly, for the reasons stated in the preamble, under the authority of 42 U.S.C. 3535(d), HUD proposes to amend 24 CFR chapter IX as follows:

PART 903—PUBLIC HOUSING AGENCY PLANS

1. The authority citation for part 903 is revised to read as follows:

Authority: 42 U.S.C. 1437c; 42 U.S.C. 1437c–1; Pub. L. 110–289; 42 U.S.C. 3535d.

2. Revise § 903.3 to read as follows:

§ 903.3 What is the purpose of this subpart?

(a) This subpart specifies the requirements for PHA plans, required by section 5A of the United States Housing Act of 1937 (42 U.S.C. 1437c–1) (the Act), as amended.

(b) Title VII of the Housing and Economic Reform Act, Public Law 110–289, section 2702, amends 42 U.S.C. 1437c–1(b) to provide qualified public housing agencies (PHAs) an exemption from the requirement of section 5A of the Act to submit an annual PHA Plan. The term “qualified public housing

agency” has the meaning stated in section 2702(a)(3)(C) of Pub. L. 110–289. HUD will make available a list of the qualified PHAs on a quarterly basis.

3. Revise part 905 to read as follows:

PART 905—THE PUBLIC HOUSING CAPITAL FUND PROGRAM

Subpart A—General

Sec.

- 905.100 Purpose, general description, and other requirements.
- 905.102 Applicability.
- 905.104 HUD approvals.
- 905.106 Compliance.
- 905.108 Definitions.

Subpart B—Eligible Activities

- 905.200 Eligible activities.
- 905.202 Ineligible activities and costs.
- 905.204 Emergencies and natural disasters.

Subpart C—General Program Requirements

- 905.300 Capital fund submission requirements.
- 905.302 Timely submission of the CF ACC amendment by the PHA.
- 905.304 CF ACC term and covenant to operate.
- 905.306 Obligations and expenditure of Capital Fund grants.
- 905.308 Federal requirements applicable to all capital fund activities.
- 905.310 Disbursements from HUD.
- 905.312 Design and construction.
- 905.314 Cost and other limitations.
- 905.316 Procurement and contract requirements.
- 905.318 Title and deed.
- 905.320 Contract administration and acceptance of work.
- 905.322 Fiscal closeout.
- 905.324 Data reporting requirements.
- 905.326 Records.

Subpart D—Capital Fund Formula

- 905.400 Capital Fund formula (CF formula).

Subpart E—Use of Capital Funds for Financing [Reserved]

Subpart F—Development Requirements

- 905.600 General.
- 905.602 Program requirements.
- 905.604 Mixed-finance development.
- 905.606 Development proposal.
- 905.608 Site or property acquisition proposal.
- 905.610 Technical processing.
- 905.612 Disbursement of capital funds—predevelopment costs.

Subpart G—Other Security Interests

- 905.700 Other security interests.

Subpart H—Compliance, HUD Review, Penalties, and Sanctions

- 905.800 Compliance.
- 905.802 HUD review of PHA performance.
- 905.804 Sanctions.

Authority: 42 U.S.C. 1437g and 3535(d); Pub. L. 110–289.

Subpart A—General

§ 905.100 Purpose, general description, and other requirements.

(a) *Purpose.* The Public Housing Capital Fund Program (Capital Fund Program or CFP) provides financial assistance to public housing agencies (PHAs) and resident management corporations (RMC) (pursuant to 24 CFR 964.225) to make improvements to existing public housing. The CFP also provides financial assistance to develop public housing, including mixed-finance developments that contain public housing units.

(b) *General description.* Congress appropriates amounts for the Capital Fund in HUD’s annual appropriations. In order to receive a Capital Fund grant, the PHA must:

(1) Validate project-level information in HUD’s data systems, as prescribed by HUD;

(2) Have an approved CFP 5-Year Action Plan;

(3) Enter into a Capital Fund Annual Contributions Contract (CF ACC) Amendment to the PHA’s Annual Contributions Contract (as defined in 24 CFR 5.403) with HUD; and

(4) Provide a written certification and counsel’s opinion that all property receiving Capital Fund assistance is under a currently effective Declaration of Trust and is in compliance with the CF ACC and the Act.

(c) *Informational requirements.* Section 905.300 of this part describes the information to be submitted to HUD for the CFP. HUD uses the Capital Fund formula set forth in § 905.400 of this part, along with data provided by the PHA and other information, including, but not limited to, the High Performance information from the Real Estate Assessment Center (REAC) and location cost indices, to determine each PHA’s annual grant amount. HUD notifies each PHA of the amount of the grant and provides a CF ACC Amendment that must be signed by the PHA and executed by HUD in order for the PHA to access the grant. After HUD executes the CF ACC Amendment, the PHA may draw down funds for eligible costs that have been described in its CFP Annual Statement/Performance and Evaluation Report or CFP 5-Year Action Plan.

(d) *Eligible activities.* Eligible Capital Fund costs and activities as further described in subpart B of this part include, but are not limited to, making physical improvements to the public housing stock and developing public housing units to be added to the existing inventory. With HUD approval, a PHA may also leverage its public housing inventory by borrowing additional

capital on the private market and pledging a portion of its annual Capital Funds for debt service in accordance with § 905.500.

(e) *Obligation and expenditure requirements.* A PHA must obligate and expend its Capital Funds in accordance with § 905.306. The PHA will directly employ labor, either temporarily or permanently, to perform work (force account) or contract for the required work in accordance with 24 CFR part 85. Upon completion of the work, the PHA must submit an Actual Modernization Cost Certificate (AMCC) or Actual Development Cost Certificate (ADCC) and a final Performance and Evaluation Report (in accordance with § 905.322) to HUD to close out each Capital Fund grant.

(f) *Financing and development.* Section 905.500 of this part regulates financing activities using Capital Funds and Operating Funds. Section 905.600 of this part contains the development requirements, including those related to mixed-finance development formerly found in 24 CFR part 941. Section 905.700 of this part describes the criteria for the use of Capital Funds for other security interest. Section 905.800 of this part addresses PHA compliance with Capital Fund requirements and HUD capability for review and sanction for noncompliance.

§ 905.102 Applicability.

All PHAs that have public housing units under an Annual Contributions Contract as described in 24 CFR 5.403 are eligible to receive Capital Funds.

§ 905.104 HUD approvals.

All HUD approvals required in this part must be in writing and from an official designated to grant such approval.

§ 905.106 Compliance.

PHAs or owner/management entities or their partners are required to comply with all applicable provisions of this part. Execution of the CF ACC Amendment, submissions required by this part, and disbursement of Capital Fund grants from HUD are individually and collectively deemed to be the PHA’s certification that it is in compliance with the provisions of this part and all other Public Housing Program Requirements. Noncompliance with any provision of this part or other applicable requirements may subject the PHA and/or its partners to sanctions contained in § 905.804.

§ 905.108 Definitions.

The following definitions apply to this part:

1937 Act. The term “1937 Act” is defined in 24 CFR 5.100.

Accessible. As defined in 24 CFR 8.3.

Additional Project Costs. The sum of the following HUD-approved costs related to the development of a public housing project:

(1) Costs for the demolition or remediation of environmental hazards associated with public housing units that will not be rebuilt on the original site; and

(2) Extraordinary site costs that have been verified by an independent state registered, licensed engineer (e.g., removal of underground utility systems; replacement of off-site underground utility systems; extensive rock and/or soil removal and replacement; and amelioration of unusual site conditions such as unusual slopes, terraces, water catchments, lakes, etc.). These costs are not subject to the Total Development Cost (TDC) limit, but are included in the maximum project cost as stated in § 905.314(b).

Capital Fund (CF). The fund established under 42 U.S.C. 1437g(d).

Capital Fund Annual Contributions Contract Amendment (CF ACC). A contract under the 1937 Act between HUD and the PHA containing the terms and conditions under which the Department assists the PHA in providing decent, safe, and sanitary housing for low-income families. The CF ACC must be in a form prescribed by HUD, under which HUD agrees to provide assistance in the development, modernization, and/or operation of a low-income housing project under the 1937 Act and the PHA agrees to modernize and operate the project in compliance with all Public Housing Requirements.

Capital Fund Program Fee. The Capital Fund Program Fee covers costs associated with the Central Office Cost Center’s (COCC) oversight and management of the Capital Fund Program. These costs include duties related to general capital planning, preparing of the Annual Plan, processing of the Line of Credit Control System (LOCCS), preparation of reports, drawing of funds, budgeting, accounting, and procurement of construction and other miscellaneous contracts. The Capital Fund Program Fee is the administrative cost for managing Capital Fund grants for PHAs subject to asset management, which is subject to the regulatory limitation of 10 percent of the annual capital fund grant.

Community Renewal Costs. Public housing capital assistance may be used to pay for Community Renewal Costs in an amount equivalent to the difference between the Housing Construction Costs

(HCCs) paid for with public housing capital assistance and the TDC limit.

Cooperation Agreement. An agreement, in a form prescribed by HUD, between a PHA and the applicable local governing body or bodies that assures exemption from real and personal property taxes, provides for local support and services for the development and operation of public housing, and provides for PHA payments in lieu of taxes (PILOT).

Date of Full Availability (DOFA). The last day of the month in which substantially all (95 percent or more) of the units in a public housing project are available for occupancy.

Emergency Work. Capital Fund related physical work items that if not done pose an immediate threat to the health or safety of residents, and which must be completed within one year of funding. Management Improvements are not eligible as emergency work and therefore must be covered by the CFP 5-Year Action Plan before the PHA may carry them out.

Expenditure. Capital Funds disbursed to the PHA to pay for obligations incurred in connection with work included in a HUD approved CFP 5-Year Action Plan. Total funds expended means cash actually disbursed and does not include retainage.

Federal Fiscal Year (FFY). The Federal Fiscal Year begins each year on October 1 and ends on September 30 of the following year.

Force Account Labor. Labor employed directly by the PHA on either a permanent or a temporary basis.

Fungibility. As it relates to the Capital Fund Program, fungibility allows the PHA to substitute work items between any of the years within the latest approved CFP 5-Year Action Plan, without prior HUD approval.

Housing Construction Cost (HCC). The sum of the following HUD-approved costs related to the development of a public housing project: Dwelling unit hard costs (including construction and equipment), builder’s overhead and profit, the cost of extending utilities from the street to the public housing project, finish landscaping, and the payment of Davis-Bacon wage rates.

Line of Credit Control System (LOCCS). LOCCS-Web is an intranet version of LOCCS for HUD personnel. eLOCCS is the Internet link to LOCCS data for HUD business partners.

Mixed-Finance Modernization. Use of the mixed-finance method of development to modernize public housing projects.

Natural Disaster. An extraordinary event, affecting only one or few PHAs, but excluding Presidentially declared

emergencies and major disasters under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, 42 U.S.C. 5121 *et seq.*

Obligation. A binding agreement for work or financing that will result in outlays, immediately or in the future. All obligations must be incorporated within the HUD-approved CFP 5-Year Action Plan. This includes funds obligated by the PHA for work to be performed by contract labor (i.e., contract award), or by force account labor (i.e., work actually started by PHA employees). Capital Funds identified in the PHA’s CFP 5-Year Action Plan to be transferred to operations are obligated by PHAs once the funds have been budgeted and drawn down by the PHA. Once these funds are drawn down they are subject to the requirements of 24 CFR part 990.

Open Grant. Any grant for which a cost certificate has not been submitted and has not reached fiscal closeout as described in § 905.322.

Operating Fund. Assistance provided under 24 CFR part 990 pursuant to section 9(e) of the 1937 Act (42 U.S.C. 1437g(e)) for the purpose of operation and management of public housing.

PIH Information Center (PIC). PH’s current system for recording data concerning: The public housing inventory, the characteristics of public housing and Housing Choice Voucher assisted families, the characteristics of PHAs, and performance measurement of housing authorities receiving Housing Choice Voucher funding.

Public Housing Agency (PHA). Any State, county, municipality, or other governmental entity or public body or agency or instrumentality of these entities that is authorized to engage or assist in the development or operation of public housing under this part.

Public Housing Assessment System (PHAS). The assessment system under 24 CFR part 902 for measuring the properties and PHA management performance in essential housing operations, including rewards for strong performers and consequences for poor performers.

Public Housing Development. Any or all undertakings necessary for planning, land acquisition, demolition, construction, or equipment in connection with a public housing project.

Public Housing Project. The term “public housing” means low-income housing, and all necessary appurtenances thereto, assisted under the 1937 Act, other than Section 8. The term “public housing” includes dwelling units in a mixed-finance project that are assisted by a public housing agency

with Capital Fund or Operating Fund assistance. When used in reference to public housing, the term “project” means housing developed, acquired, or assisted by a public housing agency under the 1937 Act, and the improvement of any such housing.

Public Housing Requirements. All requirements applicable to public housing including, but not limited to, the 1937 Act; HUD regulations; the CF ACC, including amendments; HUD notices; and all applicable federal statutes, executive orders, and regulatory requirements, as these requirements may be amended from time to time.

Reasonable cost. An amount to rehabilitate or modernize an existing structure that is not greater than 90 percent of the TDC for a new development of the same structure type, number, and size of units in the same market area. Reasonable costs are also determined with consideration of HUD regulations including 24 CFR part 85 and OMB Circular A-87.

Reconfiguration. The altering of the interior space of buildings (e.g., moving or removing interior walls to change the design, sizes, or number of units) without demolition, as defined in 24 CFR 970.5.

Uniform Federal Accessibility Standards (UFAS). As defined in 24 CFR 8.32.

Subpart B—Eligible Activities

§ 905.200 Eligible activities.

(a) **General.** Eligible activities include only items specified in an approved CFP 5-Year Action Plan as identified in § 905.300, or approved by HUD for emergency and natural disaster assistance.

(b) **Eligible activities.** Eligible activities include the development, financing, and modernization of public housing projects, including the redesign, reconstruction, and reconfiguration of public housing sites and buildings (including accessible design and construction of accessibility improvements) and the development of mixed-finance projects, including the following:

(1) **Modernization.** Modernization means the activities identified in § 905.200(a), except those activities associated with the development of public housing;

(2) **Development.** Development refers to activities and related costs to add units to a PHA’s public housing inventory under § 905.600, including: Construction and acquisition with or without rehabilitation; any and all undertakings necessary for planning,

design, financing, land acquisition, demolition, construction, or equipment, including development of public housing units, and buildings, facilities, and/or related appurtenances (i.e., nondwelling facilities/spaces). Development of mixed-finance projects include the provision of public housing through a regulatory and operating agreement, master contract, individual lease, condominium or cooperative agreement, or equity interest.

(3) **Financing.** Debt and financing costs (e.g., origination fees, interest) incurred by PHAs for development or modernization of PHA projects that involves the use of Capital Funds, including, but not limited to:

(i) Mixed Finance as described in § 905.604;

(ii) The Capital Fund Financing Program (CFFP) as described in § 905.500; and

(iii) Any other use authorized by the Secretary under section 30 of the 1937 Act (42 U.S.C. 1437).

(4) **Vacancy reduction.** Physical improvements to reduce the number of units that are vacant. Not included are costs for routine vacant unit turnaround such as painting, cleaning, and minor repairs. Vacancy reduction activities must be remedies to a defined vacancy problem detailed in a vacancy reduction program included in the PHA’s CFP 5-Year Action Plan.

(5) **Nonroutine maintenance.** Work items that ordinarily would be performed on a regular basis in the course of maintenance of property, but have become substantial in scope because they have been postponed and involve expenditures that would otherwise materially distort the level trend of maintenance expenses. These activities also include the replacement of obsolete utility systems and dwelling equipment.

(6) **Planned code compliance.** Building code compliance includes design and physical improvement costs associated with:

(i) Correcting violations of local code or the Uniform Physical Condition Standards (UPCS) under the Public Housing Assessment System (PHAS), and

(ii) A national building code, such as those developed by the International Code Council or the National Fire Protection Association; and the 2006 International Energy Conservation Code (IECC), or ASHRAE 90.1-2004 for multifamily high-rises (four stories or higher), or a successor energy code or standard that has been adopted by HUD pursuant to 42 U.S.C. 12709 or other relevant authority.

(7) Management improvements.

Activities that are project-specific or PHA-wide noncapital improvements needed to upgrade the operation of the PHA’s projects, including upgrading operations to maximize energy conservation to sustain physical improvements at those projects, or correct management deficiencies. Such activities include, but are not limited to, the following costs:

(i) Training for PHA personnel in operations and procedures;

(ii) Improvement of resident programs and services, including resident and project security, and resident selection and eviction;

(iii) Activities that assure or foster equal opportunity; and

(iv) Resident management costs not covered by the Operating Fund include, but are not limited to:

(A) The cost of technical assistance to a resident council or RMC to assess feasibility of carrying out management functions for a specific development or developments;

(B) The cost to train residents in skills directly related to the operation and management of the development(s) for potential employment by the RMC;

(C) The cost to train RMC board members in community organization, board development, and leadership; and the cost of the formation of an RMC; and

(D) When carrying out management improvement activities, the PHA shall give priority to correcting deficiencies under PHAS before expending Capital Funds on other management improvements, except for activities necessary to address emergency work or statutory or court-ordered deadlines.

(8) Resident self-sufficiency.

(i) **Economic Self-Sufficiency Costs.**

These include costs for resident job training and resident business development activities to enable residents and their businesses to carry out Capital Fund-assisted activities. HUD encourages PHAs, to the greatest extent feasible, to hire residents as trainees, apprentices, or employees to carry out activities under this part, and to contract with resident-owned businesses as required by Section 3 of the Housing and Community Development Act of 1968, 12 U.S.C. 1701u.

(ii) **Resident Participation Costs.** These are costs that promote more effective resident participation in the operation of the PHA in its Capital Fund activities to the extent not covered by \$25 per unit, per month, from the Operating Fund. They include costs for staff support, outreach, training, meeting and office space, childcare,

transportation, and access to computers that are modest and reasonable.

(iii) Economic Self-Sufficiency.

Capital expenditures to facilitate programs to improve the empowerment and economic self-sufficiency of public housing residents.

(9) *Demolition and reconfiguration.*

(i) The costs to demolish dwelling units or nondwelling facilities approved by HUD, where required, and other related costs for activities such as relocation, clearing, and grading the site after demolition, and subsequent site improvements to benefit the remaining portion of the existing public housing property, as applicable.

(ii) The costs to develop dwelling units or nondwelling facilities approved by HUD, where required, and other related costs for activities such as relocation, clearing, and grading the site prior to development.

(iii) The costs to reconfigure existing dwelling units to units with different bedroom sizes or to a nondwelling use.

(10) *Resident relocation and mobility counseling.* Relocation and other assistance (e.g., reasonable out-of-pocket expenses incurred in connection with temporary relocation, including the cost of moving to and from temporary housing and any increase in monthly rent/utility costs) for permanent or temporary relocation, as a direct result of modernization, development, rehabilitation, demolition, reconfiguration, or acquisition.

(11) *Security and safety.* Capital expenditures to improve the security and safety of residents.

(12) *Homeownership.* Activities associated with approved homeownership, such as:

(i) The cost of a study to assess the feasibility of converting rental to homeownership units and the preparation of an application for the conversion to homeownership or sale of units;

(ii) Construction or acquisition of units;

(iii) Downpayment assistance;

(iv) Closing cost assistance;

(v) Subordinate mortgage loans;

(vi) Construction or permanent financing such as write downs for new construction, or acquisition with or without rehabilitation; and

(vii) Other activities in support of the above primary homeownership activities, including but not limited to:

(A) Demolition to make way for new construction;

(B) Abatement of environmentally hazardous materials;

(C) Relocation assistance and mobility counseling;

(D) Homeownership counseling;

(E) Site improvements; or

(F) Administrative and marketing costs;

(13) *Capital Fund related legal costs* (e.g., legal costs related to preparing property descriptions for the Declaration on Trust, zoning, permitting, environmental review, procurement, and contracting).

(14) *Energy efficiency.* Allowed costs include:

(i) Energy audit or updated energy audit to the extent operating funds are not available and the energy audit is included within a modernization program.

(ii) Integrated utility management and capital planning to maximize energy conservation and efficiency measures.

(iii) Energy conservation measures identified in a PHA's most recently updated energy audit.

(iv) Improvement of energy and water-use efficiency by installing fixtures and fittings that conform to the American Society of Mechanical Engineers/American National Standards Institute standards A112.19.2-1998 and A112.18.1-2000, or any revision thereto, applicable at the time of installation, and by increasing energy efficiency and water conservation by such other means as the Secretary determines are appropriate.

(v) The installation and the use of Energy Star appliances whenever energy systems, devices, and appliances are replaced, unless it is not cost-effective to do so, in accordance with Section 152 of the Energy Policy Act of 2005, 42 U.S.C. 15841.

(vi) Utility and energy management system automation, and metering activities, including changing mastermeter systems if installed as a part of a modernization activity to upgrade utility systems, e.g. electric, water, or gas systems of the PHA consistent with the requirements of 24 CFR part 965.

(15) *Administrative costs.* Any administrative costs, including salaries and employee benefit contributions, other than the Capital Fund Program Fee, must be related to a specific public housing development or modernization project and detailed in the CFP 5-Year Action Plan.

(16) *Audit.* Costs of the annual audit attributable to the portion of the audit covering the CFP in accordance with § 905.322(c).

(17) *Capital Fund Program Fee.* This fee covers costs associated with oversight and management of the CFP attributable to the HUD-accepted COCC as described in 24 CFR part 990 subpart H. These costs include duties related to capital planning, preparing the CFP

Annual Statement/Performance and Evaluation Report, preparing the CFP 5-Year Action Plan, monitoring of LOCCS, preparing reports, drawing of funds, budgeting, accounting, and procuring of construction and other miscellaneous contracts. This fee is not intended to cover costs associated with construction supervisory and inspection functions that are considered a front-line cost of the project.

(18) *Emergency activities.* Capital Fund related activities identified as emergency work, as defined in § 905.108, whether or not the need is indicated in the CFP 5-Year Action Plan.

§ 905.202 Ineligible activities and costs.

The following are ineligible activities and costs for the Capital Fund Program:

(a) Costs not associated with a public housing project or development, as defined in § 905.604(b)(1);

(b) Activities and costs not included in the PHA's CFP 5-Year Action Plan;

(c) Improvements or purchases that are not modest in design and cost because they include amenities, materials, and design in excess of what is customary for the locality;

(d) Any costs not authorized as outlined in OMB Circular A-87, codified at 2 CFR part 225, including, but not limited to, indirect administrative costs and indemnification;

(e) Public housing operating assistance, except as provided in § 905.314(l);

(f) Direct provision of social services through either force account or contract labor;

(g) Eligible costs that are in excess of the amount directly attributable to the public housing units when the physical or management improvements, including salaries and employee benefits and contributions, will benefit programs other than public housing, such as Section 8 housing choice voucher or local revitalization programs;

(h) Eligible cost that is funded by another source and would result in duplicate funding; and

(i) Any other activities and costs that HUD may determine on a case-by-case basis.

§ 905.204 Emergencies and natural disasters.

(a) *General.* PHAs are required by the CF ACC to carry various types of insurance to protect it from loss. In most cases, insurance coverage will be the primary source of funding to pay repair or replacement costs associated with emergencies and natural disasters. Where the Department's Annual

Appropriations Act requires a set aside from the Capital Fund appropriation for emergencies and natural disasters, the procedures in this section apply.

(b) *Estimate required.* An independent estimate of damage and repair cost is required as a part of the final natural disaster application. For natural disasters, the assessment must identify damage specifically caused by the natural disaster from other repairs. The set aside can be used only to pay costs to repair or replace a public housing project damaged as a result of the natural disaster, not for nonroutine maintenance or other improvements.

(c) *Emergencies and natural disasters.* An emergency is an unforeseen or unpreventable event or occurrence that poses an immediate threat to the health and safety of the residents that must be corrected within one year of funding. A natural disaster for purposes of the Capital Fund reserve is a non-Presidentially declared disaster. In the event an emergency or natural disaster arises, HUD may require a PHA to use any other source that may legally be available, including unobligated Capital Funds, prior to providing emergency or natural disaster funds from the set aside. The Department will review, on a case-by-case basis, requests for emergency and natural disaster funding from PHAs that have unobligated Capital Funds.

(d) *Procedure to request emergency or natural disaster funds.* To obtain emergency or natural disaster funds, a PHA shall submit a written request in the form and manner prescribed by HUD. In instances where the PHA requires immediate relief to preserve the property and safety of the residents, the PHA may submit a preliminary request outlined in § 905.204(f). Subsequently, the PHA is required to complete and submit the remaining information outlined in § 905.204(g), at a time prescribed by HUD.

(e) *Procedure to request preliminary natural disaster grant for immediate preservation.* A PHA may request a preliminary grant only for costs necessary for immediate preservation of the property and protection of the residents. The application should include the reasonable identification of damage and preservation costs as determined by the PHA. An independent assessment will be required when the PHA submits the final request or when the PHA reconciles the preliminary application grant with the actual amounts received from the Federal Emergency Management Agency (FEMA), insurance carriers, and other natural disaster relief sources. Regardless of whether further funding from the set aside is requested,

at a time specified by HUD, the PHA will be expected to provide a reconciliation of all funds received, to ensure that the PHA does not receive duplicate funding.

(f) *Procedure for final request of emergency or natural disaster funds.* In the request the PHA shall:

(1) Identify the public housing project(s) with the emergency or natural disaster condition(s).

(2) Identify and provide the date of the:

(i) Conditions that present an unforeseen or unpreventable threat to the health, life, or safety of residents in the case of emergencies; or

(ii) Natural disaster (e.g., hurricane, tornado, etc.).

(3) Describe the activities that will be undertaken to correct the emergency or the conditions caused by the natural disaster and the estimated cost.

(4) Provide an independent assessment of the extent of and the cost to correct the condition. The assessment must be specific as to the damage and costs associated with the emergency or natural disaster.

(5) Provide a copy of a currently effective Declaration of Trust covering the property and an opinion of counsel that there are no preexisting liens or other encumbrances on the property.

(6) Demonstrate that without the requested funds from the set aside the PHA does not have adequate funds available to correct the emergency condition(s).

(7) Identify all other sources of available funds (e.g., insurance proceeds, FEMA).

(8) Any other material required by HUD.

(g) *HUD Action.* HUD shall review all requests for emergency or natural disaster funds. If HUD determines that a PHA's request meets the requirements of this section, HUD shall approve the request subject to the availability of funds in the set aside, in the order in which requests are received and are determined approvable.

(h) *Submission of the CF ACC.* Upon being provided with a CF ACC Amendment from HUD, the PHA must sign and date the CF ACC Amendment and return it to HUD by the date established by HUD. HUD will execute the signed and dated CF ACC Amendment submitted by the PHA.

Subpart C—General Program Requirements

§ 905.300 Capital fund submission requirements.

(a) *General.* Unless otherwise stated, the requirements in this section apply to

both qualified Public Housing Agencies (as described in § 903.3) and non-qualified Public Housing Agencies. Each PHA must complete a comprehensive physical needs assessment (PNA) to be submitted at a time and in a format prescribed by HUD. The PHA shall use the PNA to identify and prioritize work to be performed with Capital Funds at each project.

(b) *Capital Fund program submission requirements.* At the time that the PHA submits the ACC Amendment(s) for its Capital Fund Grants(s) to HUD, the PHA must also submit the following items:

(1) *Budget.* The Capital Fund Budget, including attachments, shall be prepared by a PHA using the form(s) prescribed by HUD. The PHA's budget must be approved by the PHA's Board of Commissioners; it does not require HUD approval. Work items listed in the budget must include, but are not limited to the following:

(i) Where a PHA has an approved Capital Fund Financing Program (CFFP) loan, debt service payments for the grants from which the payments are scheduled;

(ii) Where a PHA has an approved CFFP loan, the PHA shall also include all work and costs, including debt service payments, in the CFP 5-Year Action Plan. Work associated with the use of financing proceeds will be reported separately in the CFP Annual Statement/Performance and Evaluation Report; or

(iii) Work affecting health and safety and compliance with regulatory requirements such as section 504 of the Rehabilitation Act of 1973 and HUD's implementing regulations at 24 CFR part 8, and the lead-based paint poisoning prevention standards at 24 CFR part 35, before major systems (e.g., heating, roof, etc.) and other costs of lower priority.

(2) *Certifications required for receipt of Capital Fund grants.* The PHA is also required to submit various certifications to HUD, in a form prescribed by HUD, including, but not limited to:

(i) Certification of PIC Data;

(ii) Standard Form—Disclosure of Lobbying Activities;

(iii) Standard Form—Drug Free Workplace;

(iv) Civil Rights Compliance in a form prescribed by HUD; and

(v) Compliance with Public Hearing Requirements.

(3) *Public hearing and Resident Advisory Board requirements.* A PHA must annually conduct a public hearing and consult with the Resident Advisory Board of the PHA to discuss either the PHA Annual Plan, or any changes to the goals, objectives, and policies of the

qualified PHA, in order to solicit public comment.

(4) *Qualified and non-qualified PHAs.* (i) Qualified PHAs, as described in 24 CFR 903.3, are required to comply with the requirements in the Housing and Economic Recovery Act (HERA), Public Law 110-289 (approved July 30, 2008), section 2702.

(ii) Non-Qualified PHAs are required to comply with the requirements of 24 CFR part 903.

(5) *HUD review for compliance.* The CFP submission requirements must meet the requirements of this part as well as the Public Housing Program Requirements as defined in § 905.108. PHAs are required to revise or correct information that is not in compliance, and HUD has the authority to impose administrative sanctions until the appropriate revisions are made. HUD will review the CFP submission requirements to determine whether:

(i) All of the information that is required to be submitted is included;

(ii) The information is consistent with the needs identified in the PNA and data available to HUD; and

(iii) There are any issues of compliance with applicable laws, regulations, or contract requirements that have not been addressed with the proposed use of the Capital Fund.

(6) *Time frame for submission of requirements.* The requirements identified in § 905.300(b) must be submitted to HUD in a format prescribed by HUD at the time that the PHA submits its signed CF ACC Amendment.

(7) *CFP 5-Year Action Plan covering large capital items for all PHAs.*

(i) *Content.* The CFP 5-Year Action Plan must describe the capital improvements necessary to ensure long-term physical and social viability of the PHA's public housing developments, including the capital improvements to be undertaken with the 5-year period, their estimated costs, and any other information required for participation in the CFP as prescribed by HUD. Except in the case of emergency work, the PHA shall not spend Capital Funds on any work that is not included in an approved CFP 5-Year Action Plan and its amendments.

(ii) *Submission.* The PHA must submit a CFP 5-Year Action Plan at least once every 5 years. The PHA may choose to update its CFP 5-Year Action Plan every year. The PHA shall indicate whether its CFP 5-Year Action Plan is fixed or rolling.

(iii) PHAs making amendments to the CFP 5-Year Action Plan must follow the requirements in 24 CFR 903.21.

(iv) HUD Review and Approval. PHA submission and HUD Approval requirements for the CFP 5-Year Action Plan must be made pursuant to 24 CFR part 903. In any given year that a PHA does not have an approved CFP 5-Year Action Plan, the Capital Fund grant(s) for these PHAs will be reserved and obligated; however, the PHA will not have access to those funds until its CFP 5-Year Action Plan is approved by HUD.

(8) *Performance and Evaluation Report.*

(i) All PHAs must prepare a CFP Annual Statement/Performance and Evaluation Report at a time and in a format prescribed by HUD. These reports shall be retained on file for all grants for which a final Actual Modernization Cost Certificate (AMCC) or an Actual Development Cost Certificate (ADCC) has not been submitted. A final Performance and Evaluation Report must be submitted in accordance with 24 CFR 905.322, at the time the PHA submits its AMCC or ADCC.

(ii) PHAs that are designated as Troubled under PHAS or the Section 8 Management Assessment Program (SEMAP), and/or were identified as noncompliant with section 9(j) obligation and expenditure requirements during the fiscal year, shall submit their CFP Annual Statement/Performance and Evaluation Reports to HUD for review and approval.

(iii) All other PHAs that are not designated as Troubled under PHAS, and were in compliance with section 9(j) obligation and expenditure requirements during the fiscal year, shall prepare a CFP Annual Statement/Performance and Evaluation report for all open grants and shall retain the report(s) on file at PHA to be available to HUD upon request.

§ 905.302 Timely submission of the CF ACC amendment by the PHA.

Upon being provided with a CF ACC Amendment from HUD, the PHA must sign and date the CF ACC Amendment and return it to HUD by the date established. HUD will execute the signed and dated CF ACC Amendment submitted by the PHA. If HUD does not receive the signed and dated Amendment by the submission deadline, the PHA will receive the Capital Fund grant for that year; however, it will have less than 24 months to obligate 90 percent of the Capital Fund grant and less than 48 months to expend these funds because the PHA's obligation start date and disbursement end date for these grants

will remain as previously established by HUD.

§ 905.304 CF ACC term and covenant to operate.

(a) *Period of obligation to operate as public housing.* The PHA shall operate all public housing projects in accordance with the CF ACC, as amended, and applicable HUD regulations for the statutorily prescribed period. These periods shall be evidenced by a recorded Declaration of Trust on all public housing property. If the PHA uses Capital Funds to develop public housing or to modernize existing public housing, the CF ACC term and the covenant to operate those projects are as follows:

(1) *Development activities.* Each public housing project developed using Capital Funds shall establish a restricted use covenant to operate under the terms and conditions applicable to public housing for a 40-year period that begins on the date on which the project becomes available for occupancy, as determined by HUD.

(2) *Modernization activities.* For PHAs that receive Capital Fund assistance, the execution of each new CF ACC Amendment establishes an additional 20-year period that begins on the latest date on which modernization is completed, except that the additional 20-year period does not apply to a project that receives Capital Fund assistance only for management improvements.

(3) *Operating fund.* Any public housing project developed that receives Operating Fund assistance shall have a covenant to operate under requirements applicable to public housing for a 10-year period beginning upon the conclusion of the fiscal year for which such amounts were provided, except for such shorter period as permitted by HUD by an exception.

(b) *Mortgage or security interests.* The PHA shall not allow any mortgages or security interests in public housing assets, including under section 30 of the 1937 Act, without prior written approval from HUD.

(c) *Applicability of latest expiration date.* All public housing subject to this part or required by law shall be maintained and operated as public housing as prescribed until the latest expiration date provided in section 9(d)(3) of the 1937 Act (42 U.S.C. 1437g(d)(3)) or any other provision of law or regulation mandating the operation of the housing as public housing, or under terms and conditions applicable to public housing, for a specified period of time.

§ 905.306 Obligation and expenditure of Capital Fund grants.

(a) *Obligation.* A PHA shall obligate each Capital Fund grant, including formula grants, Replacement Housing Factor (RHF) grants, and natural disaster grants, no later than 24 months, and emergency grants no later than 12 months after the date on which the funds become available to the PHA for obligation, except as provided in paragraphs (c) and (d) of this section. However, a PHA with unobligated funds from a grant shall disregard this requirement for up to not more than 10 percent of the originally allocated funds from that grant. The funds become available to the PHA when HUD executes the CF ACC Amendment. With HUD approval, the PHA can accumulate RHF grants for up to 5 years or until it has adequate funds to undertake replacement housing. The PHA shall obligate 90 percent of the RHF grant within 24 months from the date that the PHA accumulates adequate funds, except as provided in paragraph (c) of this section.

(b) *Items and costs.* For funds to be considered obligated, all items and costs must meet the criteria for an obligation in § 905.108.

(c) *Extension to obligation requirement.* The PHA may request an extension of the obligation deadline, and HUD may grant an extension for a period of up to 12 months, based on:

(1) The size of the PHA;

(2) The complexity of the CFP of the PHA;

(3) Any limitation on the ability of the PHA to obligate the amounts allocated for the PHA from the Capital Fund in a timely manner as a result of state or local law; or

(4) Any other factors that HUD determines to be relevant.

(d) *HUD extension for other reasons.* HUD may extend the obligation deadline for a PHA for such a period as HUD determines to be necessary, if HUD determines that the failure of the PHA to obligate assistance in a timely manner is attributable to:

(1) Litigation;

(2) Delay in obtaining approvals from the Federal Government or a state or local government that is not the fault of the PHA;

(3) Compliance with environmental assessment and abatement requirements;

(4) Relocating residents;

(5) An event beyond the control of the PHA; or

(6) Any other reason established by HUD by Notice in the **Federal Register**.

(e) *Failure to obligate.* (1) For any month during the fiscal year, HUD shall

withhold all new Capital Fund grants, including RHF grants, from any PHA that has unobligated funds in violation of § 905.306(a). The penalty will be imposed once the violations of § 905.306(a) are known. The PHA may cure the noncompliance by:

(i) Requesting in writing that HUD recapture the unobligated balance of the grant; or

(ii) Continuing to obligate funds for the grant in noncompliance until the noncompliance is cured.

(2) After the PHA has cured the noncompliance, HUD will release the withheld Capital Fund grant(s) minus a penalty of 1/12th of the grant for each month of noncompliance.

(f) *Expenditure.* The PHA shall expend all grant funds within 48 months after the date on which funds become available, as described in § 905.306(a). The deadline to expend funds may be extended only by the period of time of a HUD-approved extension of the obligation deadline. No other extensions of the expenditure deadline will be granted. All funds not expended will be recaptured.

§ 905.308 Federal requirements applicable to all capital fund activities.

(a) The PHA shall comply with the requirements of 24 CFR part 5 (General HUD Program Requirements; Waivers), 24 CFR part 85 (Administrative Requirements for Grants and Cooperative Agreements to State, Local and Federally Recognized Indian Tribal Governments), and this part.

(b) The PHA shall also comply with the following program requirements.

(1) *Nondiscrimination and equal opportunity.* The PHA shall comply with all applicable nondiscrimination and equal opportunity requirements, including, but not limited to, the Department's generally applicable nondiscrimination and equal opportunity requirements at 24 CFR 5.105(a) and the Architectural Barriers Act of 1968, 42 U.S.C. 4151 *et seq.*, and its implementing regulations at 24 CFR parts 40 and 41. The PHA shall affirmatively further fair housing in its use of funds under this part, which includes but is not limited to addressing modernization and development in the completion of requirements at 24 CFR 903.7(o).

(2) *Environmental requirements.* All activities under this part are subject to an environmental review by a responsible entity under HUD's environmental regulations at 24 CFR part 58 and must comply with the requirements of the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 *et seq.*) and the

related laws and authorities listed at 24 CFR 58.5. HUD may make a finding in accordance with 24 CFR 58.11 and may perform the environmental review itself under the provisions of 24 CFR part 50. In those cases where HUD performs the environmental review under 24 CFR part 50, it will do so before approving a proposed project, and will comply with the requirements of NEPA and the related requirements at 24 CFR 50.4.

(3) *Wage rates.* (i) *Davis-Bacon wage rates.* For all work or contracts exceeding \$2,000 in connection with development activities or modernization activities (except for nonroutine maintenance work, as defined in § 905.200(b)(5) of this part), all laborers and mechanics employed on the construction, alteration, or repair shall be paid not less than the wages prevailing in the locality, as determined by the Secretary of Labor pursuant to the Davis-Bacon Act (40 U.S.C. 3142).

(ii) *HUD-determined wage rates.* For all operations work and contracts, including routine and nonroutine maintenance work (as defined in § 905.200(b)(5) of this part), all laborers and mechanics employed shall be paid not less than the wages prevailing in the locality, as determined or adopted by HUD pursuant to section 12(a) of the 1937 Act, 42 U.S.C. 1437j(a).

(iii) *State wage rates.* Preemption of state prevailing wage rates as provided at 24 CFR 965.101.

(iv) *Volunteers.* The prevailing wage requirements of this section do not apply to volunteers performing development, modernization, or nonroutine maintenance work under the conditions set out in 24 CFR part 70.

(4) *Technical wage rates.* All architects, technical engineers, draftsmen, and technicians (other than volunteers under the conditions set out in 24 CFR part 70) employed in a development or modernization project shall be paid not less than the wages prevailing in the locality, as determined or adopted (subsequent to a determination under applicable state or local law) by HUD.

(5) *Lead-based paint poisoning prevention.* The PHA shall comply with the Lead-Based Paint Poisoning Prevention Act (LPPPA) (42 U.S.C. 4821 *et seq.*), the Residential Lead-Based Paint Hazard Reduction Act (42 U.S.C. 4851 *et seq.*), and the Lead Safe Housing Rule and the Lead Disclosure Rule at 24 CFR part 35.

(6) *Fire safety.* A PHA shall comply with the requirements of section 31 of the Federal Fire Prevention and Control Act of 1974 (15 U.S.C. 2227).

(7) *Flood insurance and floodplain requirements.* The PHA will not engage

in the acquisition, construction, or improvement of a public housing project located in an area that has been identified by the Federal Emergency Management Agency (FEMA) as having special flood hazards, unless:

(i) The requirements of 24 CFR part 55, Floodplain Management, have been met, including a determination by a responsible entity under 24 CFR part 58 or by HUD under 24 CFR part 50 that there is no practicable alternative to locating in an area of special flood hazards; and the minimization of unavoidable adverse impacts.

(ii) Flood insurance on the building is obtained in compliance with the Flood Disaster Protection Act of 1973 (42 U.S.C. 4001 *et seq.*); and

(iii) The community in which the area is situated is participating in the National Flood Insurance Program in accordance with 44 CFR parts 59 through 79, or less than one year has passed since FEMA notification regarding flood hazards.

(8) *Coastal barriers.* In accordance with the Coastal Barriers Resources Act (16 U.S.C. 3501 *et seq.*), no financial assistance under this part may be made available within the Coastal Barrier Resources System.

(9) *Displacement, relocation, and real property acquisition.* All acquisition or rehabilitation activities carried out under the Capital Fund, including acquisition of any property for development, shall comply with the Uniform Relocation Assistance and Real Property Acquisition Policies Act of 1970 (URA) (42 U.S.C. 4601–4655) and with implementing regulations at 49 CFR part 24. Demolition or disposition under section 9(d)(4) is covered by the section 18 relocation provisions at 24 CFR 970.21.

(10) *Procurement and contract requirement.* PHAs and their contractors shall comply with Section 3 of the Housing and Community Development Act of 1968 (12 U.S.C. 1701u) and HUD's implementing rules at 24 CFR part 135.

§ 905.310 Disbursements from HUD.

(a) The PHA shall initiate a fund requisition from HUD only when funds are due and payable, unless HUD approves another payment schedule as authorized by 24 CFR 85.21.

(b) The PHA shall maintain detailed disbursement records to document eligible expenditure (*e.g.*, contracts or other applicable documents), in a form and manner prescribed by HUD.

§ 905.312 Design and construction.

The PHA shall meet the following design and construction standards, as

applicable, for all development and modernization.

(a) Physical structures shall be designed, constructed, and equipped to be consistent with the neighborhoods they occupy; meet contemporary standards of modest design, comfort, and livability; promote security; maximize energy conservation; and be attractive and marketable to the people they are intended to serve.

(b) All development projects shall be designed and constructed in compliance with:

(1) A national building code, such as those developed by the International Code Council or the National Fire Protection Association; and the 2006 International Energy Conservation Code (IECC), or ASHRAE 90.1–2004 for multifamily high-rises (four stories or higher), or a successor energy code or standard that has been adopted by HUD pursuant to 42 U.S.C. 12709 or other relevant authority;

(2) Applicable state and local laws, codes, ordinances, and regulations;

(3) Other federal requirements, including fire protection and safety standards implemented under section 31 of the Fire Administration Authorization Act of 1992, 15 U.S.C. 2227 and HUD minimum property standards (*e.g.*, 24 CFR part 200, subpart S);

(4) Accessibility Requirements as required by Section 504 of the Rehabilitation Act (29 U.S.C. 794) and implementing regulations at 24 CFR part 8; Title II of the Americans with Disabilities Act (42 U.S.C. 12101 *et seq.*) and implementing regulations at 28 CFR part 35; and, if applicable, the Fair Housing Act (42 U.S.C. 3601–3619) and implementing regulations at 24 CFR part 100; and

(5) High-rise elevator structure specifications. A high-rise elevator structure shall not be provided for families with children regardless of density, unless the PHA demonstrates and HUD determines that there is no practical alternative, where project-based Section 8 assistance under 42 U.S.C. 1437f(o)(13) is provided through a Housing Assistance Payment (HAP) contract, in which case the assistance may be provided to a high-rise elevator building, including one occupied by families with children, without review and approval of the contract by the Secretary.

(c) All modernization projects shall be designed and constructed in compliance with:

(1) The modernization standards as prescribed by HUD;

(2) Accessibility requirements as required by Section 504 of the

Rehabilitation Act (29 U.S.C. 794) and implementing regulations at 24 CFR part 8; Title II of the Americans with Disabilities Act (42 U.S.C. 12101 *et seq.*) and implementing regulations at 28 CFR part 35; and, if applicable, the Fair Housing Act (42 U.S.C. 3601–3619) and implementing regulations at 24 CFR part 100; and

(3) Cost-effective energy conservation measures, identified in the PHA's most recently updated energy audit, conducted pursuant to 24 CFR part 965, subpart C.

(d) PHAs shall use appliances that are Energy Star products or Federal Energy Management Program-designed products, unless the PHA determines that the purchase of these appliances is not cost-effective.

§ 905.314 Cost and other limitations.

(a) *Eligible administrative costs.* Where the physical or management improvement costs will benefit programs other than Public Housing, such as the Housing Choice Voucher program or local revitalization programs, eligible administrative costs are limited to the amount directly attributable to the public housing program.

(b) *Maximum project cost.* The maximum project cost represents the total amount of public housing capital assistance used in connection with the development of a public housing project, and includes:

(1) Project costs that are subject to the TDC limit (*i.e.*, HCC and Community Renewal Costs); and

(2) Project costs that are not subject to the TDC limit (*i.e.*, Additional Project Costs). The total project cost to be funded with public housing capital assistance, as set forth in the proposal and as approved by HUD, becomes the maximum project cost stated in the CF ACC Amendment. Upon completion of the project, the actual project cost is determined based upon the amount of public housing capital assistance expended for the project, and this becomes the maximum project cost for purposes of the CF ACC Amendment.

(c) *TDC limit.* (1) The Capital Fund may not be used to pay for Housing Construction Cost (HCC) and Community Renewal Costs in excess of the TDC limit, as determined under paragraph (b)(2) of this section. However, HOPE VI grantees will be eligible to request a TDC exception for public housing and HOPE VI funds awarded in FFY 1996 and prior years. However, PHAs may also request a TDC exception for integrated utility management, capital planning, and other capital and management activities

that maximize energy conservation and efficiency, including green construction and retrofits, which include windows; heating system replacements; wall insulation; site-based generation; advanced energy savings technologies, including renewable energy generation; and other such retrofits. HUD will apply a cost-effectiveness test to ensure that up-front expenditures due to the exception would be justified by future cost savings when deciding whether to grant a TDC waiver under this section.

(2) *Determination of TDC limit.* HUD will determine the TDC for a public housing project as follows:

(i) *Step 1: Unit construction cost guideline.* HUD will first determine the applicable "construction cost guideline," averaging the current construction costs as listed in two nationally recognized residential construction cost indices for publicly bid construction of a good and sound quality for specific bedroom sizes and structure types. The two indices HUD will use for this purpose are the R.S. Means cost index for construction of "average" quality and the Marshall & Swift cost index for construction of "good" quality. HUD has the discretion to change the cost indices to other such indices that reflect comparable housing construction quality through a notice published in the **Federal Register**.

(ii) *Step 2: Bedroom size and structure types.* The construction cost guideline is then multiplied by the number of units for each bedroom size and structure type.

(iii) *Step 3: Elevator and non-elevator type structures.* HUD will then multiply the resulting amounts from step 2 by 1.6 for elevator type structures and by 1.75 for non-elevator type structures.

(iv) *Step 4: TDC limit.* The TDC limit for a project is calculated by adding the resulting amounts from step 3 for all the public housing units in the project.

(3) *Costs not subject to the TDC limit.* Additional Project Costs are not subject to the TDC limit, which is described in paragraph (c) of this section.

(4) *Funds not subject to the TDC limit.* A PHA may use funding sources not subject to the TDC limit (e.g., Community Development Block Grant (CDBG) funds, low-income tax credits, private donations, private financing, etc.) to cover project costs that exceed the TDC limit or the HCC limit described in paragraph (c) of this section. Such funds, however, may not be used for items that would result in substantially increased operating, maintenance, or replacement costs, and must meet the requirements of section 102 of the Department of Housing and Urban Development Reform Act of 1989 (Pub. L. 101-235, approved December

15, 1989) (42 U.S.C. 3545). These funds must be included in the project development cost budget.

(d) *Housing Construction Costs (HCC).*

(1) General. A PHA may not use Capital Funds to pay for HCC in excess of the amount determined under paragraph (c)(2) of this section.

(2) Determination of HCC limit. HUD will determine the HCC limit as listed in at least two nationally recognized residential construction cost indices for publicly bid construction of a good and sound quality for specific bedroom sizes and structure types. The two indices HUD will use for this purpose are the R.S. Means cost index for construction of "average" quality and the Marshall & Swift cost index for construction of "good" quality. HUD has the discretion to change the cost indices to other such indices that reflect comparable housing construction quality through a notice published in the **Federal Register**. The resulting construction cost guideline is then multiplied by the number of public housing units in the project based upon bedroom size and structure type. The HCC limit for a project is calculated by adding the resulting amounts for all public housing units in the project.

(3) The HCC limit is not applicable to the acquisition of existing housing, whether or not such housing will be rehabilitated. The TDC limit is applicable to such acquisition.

(e) *Community Renewal Costs.* Capital Funds may be used to pay for Community Renewal Costs in an amount equivalent to the difference between the HCC paid for with public housing capital assistance and the TDC limit.

(f) *Rehabilitation of existing public housing projects.* The HCC limit is not applicable to the rehabilitation of existing Public Housing Projects. The TDC limit for modernization of existing public housing is 90 percent of the TDC limit as determined under § 905.314(c). This limitation does not apply to the rehabilitation of any property acquired pursuant to § 905.600.

(g) *Modernization cost limits.* If the modernization costs are more than 90 percent of the TDC, then the project shall not be modernized. Capital Funds shall not be expended to modernize an existing public housing development that fails to meet the HUD definition of reasonable cost found in § 905.108, except for:

(1) Emergency work;

(2) Essential maintenance necessary to keep a public housing project habitable until the demolition or disposition application is approved; or

(3) The costs of maintaining the safety and security of a site that is undergoing demolition.

(h) *Administrative cost limits and Capital Fund Program Fee.*

(1) Administrative cost limits (for non-asset management PHAs).

(i) Modernization. The PHA shall not budget or expend more than 10 percent of its annual Capital Fund grant on administrative costs, in accordance with its CFP 5-Year Action Plan. The 10 percent limit excludes any costs related to lead-based paint or asbestos testing, in-house Architectural and Engineering work, or other special administrative costs required by state or local law.

(ii) Development. For development work with Capital Fund and RHF grants, the administrative cost limit is 3 percent of the total project budget, or, with HUD's approval, up to 6 percent of the total project budget.

(2) Capital Fund Program Fee (for asset management PHAs). For a PHA that is under asset management, the Capital Fund Program Fee and administrative costs limits are the same. For the Capital Fund Program Fee, a PHA may charge a management fee of up to 10 percent of the annual CFP formula grant(s) amount, excluding emergency and disaster grants and also excluding any costs related to lead-based paint or asbestos testing, in-house Architectural and Engineering work, or other special administrative costs required by state or local law. The Capital Fund Program Fee for development work funded with Capital Fund and RHF grants is 3 percent of the total project budget, or, with HUD approval, up to 6 percent of the total project budget.

(i) *Management improvement cost limits.* A PHA shall not budget nor use more than 20 percent of its annual Capital Fund grant for management improvement costs identified in its CFP 5-Year Action Plan through FY 2010. In FFY 2011, a PHA shall not budget nor use more than 16 percent for management improvements for grants awarded in that fiscal year; for FFY 2012, a PHA shall not budget nor use more than 13 percent for grants awarded in that year; and for FFY 2013 and thereafter, a PHA shall not budget nor use more than 10 percent for grants awarded. Management improvements are an eligible expense for PHAs participating in Asset Management.

(j) *Types of labor.* A PHA may use force account labor for development and modernization activities if included in a HUD-approved CFP 5-Year Action Plan. HUD approval to use force account labor is not required when the PHA is

designated as a High Performer under PHAS.

(k) *RMC activities.* When the entire development, financing, or modernization activity, including the planning and architectural design, is administered by an RMC, the PHA shall not retain any portion of the Capital Funds for any administrative or other reason unless the PHA and the RMC provide otherwise by contract.

(l) *Capital Funds for operating costs.* A PHA may use Capital Funds for operating costs only if it is included in the HUD-approved CFP 5-Year Action Plan and limited as described in paragraphs (l)(1) and (2) of this section. Capital Funds identified in the CFP 5-Year Action Plan to be transferred to operations are obligated once the funds have been budgeted and drawn down by the PHA. Once such transfer of funds occurs, the PHA must follow the requirements of 24 CFR part 990 with respect to those funds.

(1) *Large PHAs.* A PHA with 250 or more units may use no more than 20 percent of its annual Capital Fund grant for activities that are eligible under the Operating Fund at 24 CFR part 990.

(2) *Small PHAs.* A PHA with less than 250 units, that is not designated as troubled under PHAS, may use up to 100 percent of its annual Capital Fund grant for activities that are eligible under the Operating Fund at 24 CFR part 990, except that the PHA must have determined that there are no debt service payments, significant Capital Fund needs, or emergency needs that must be met prior to transferring 100 percent of its funds to operating expenses.

§ 905.316 Procurement and contract requirements.

(a) *General.* PHAs shall comply with 24 CFR 85.36, and HUD implementing instructions, for all capital activities including modernization and development except as provided in paragraph (c) in this section.

(b) *Contracts.* The PHA shall use all contract forms prescribed by HUD. If a form is not prescribed, the PHA may use any Office of Management and Budget (OMB) approved form that contains all applicable federal requirements and contract clauses.

(c) *Mixed-finance development projects.* Mixed-finance development partners may be selected in accordance with the 24 CFR 905.604. Contracts and other agreements with mixed-finance development partners must specify that they comply with the requirements of §§ 905.602 and 905.604.

(d) *Assurances of completion.* Notwithstanding 24 CFR 85.36(h), for

each construction contract over \$100,000, the contractor shall furnish the PHA with the following:

(1) A bid guarantee from each bidder equivalent to 5 percent of the bid price; and

(2) One of the following:

(i) A performance bond and payment bond for 100 percent of the contract price;

(ii) A performance bond and a payment bond, each for 50 percent or more of the contract price;

(iii) A 20 percent cash escrow;

(iv) A 25 percent irrevocable letter of credit with terms acceptable to HUD, or

(v) Any other payment method acceptable to HUD.

(e) *Procurement of recovered materials.* PHAs that are state agencies and agencies of a political subdivision of a state that are using assistance under this part for procurement, and any person contracting with such PHAs with respect to work performed under an assisted contract, must comply with the requirements of section 6002 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act. In accordance with section 6002, these agencies and persons must procure items designated in guidelines of the Environmental Protection Agency (EPA) at 40 CFR part 247 that contain the highest percentage of recovered material practicable, consistent with maintaining a satisfactory level of competition, where the purchase price of the item exceeds \$10,000 or the value of the quantity acquired in preceding fiscal year exceeded \$10,000; must procure solid waste management services in a manner that maximizes energy and resource recovery; and must have established an affirmative procurement program for procurement of recovered materials identified in the EPA guidelines.

§ 905.318 Title and deed.

The PHA shall obtain a title insurance policy that guarantees the title is good and marketable before taking title to any and all sites and properties acquired with Capital Funds. The PHA shall record within 90 days the deed and Declaration of Trust in the form and in the manner prescribed by HUD. The PHA shall at all times maintain a recorded Declaration of Trust in the form and manner prescribed by HUD on all public housing projects covering the term required by this part.

§ 905.320 Contract administration and acceptance of work.

(a) *Contract administration.* The PHA is responsible, in accordance with 24 CFR 85.36, for all contractual and

administrative issues arising out of their procurements. The PHA shall maintain full and complete records on the history of each procurement transaction.

(b) *Inspection and acceptance.* The PHA or owner, in the case of mixed finance, shall carry out inspections of work in progress and goods delivered, as necessary, to ensure compliance with existing contracts. If, upon inspection, the PHA determines that the work and/or goods are complete, satisfactory and, as applicable, otherwise undamaged, except for any work that is appropriate for delayed completion, the PHA shall accept the work. The PHA shall determine any hold-back for items of delayed completion and the amount due and payable for the work that has been accepted, including any conditions precedent to payment that are stated in the construction contract or contract of sale. The contractor shall be paid for items only after the PHA inspects and accepts that work.

(c) *Guarantees and warranties.* The PHA or owner, in the case of mixed finance, shall specify the guaranty period and amounts to be withheld, as applicable, and shall provide that all contractor, manufacturer, and supplier warranties required by the construction and modernization documents shall be assigned to the PHA. The PHA shall inspect each dwelling unit and the overall project approximately 3 months after the beginning of the project guaranty period, 3 months before its expiration, and at other times as may be necessary to exercise its rights before expiration of any warranties. The PHA shall require repair or replacement of all defective items prior to the expiration of the guaranty or warranty periods.

(d) *Notification of completion.* The PHA shall require that all contractors and developers notify the PHA in writing when the contract work, including any approved off-site work, will be completed and ready for inspection.

§ 905.322 Fiscal closeout.

(a) *General.* Each Capital Fund grant and/or development project is subject to fiscal closeout. Fiscal closeout includes the submission of a cost certificate; an audit, if applicable; a final Performance and Evaluation Report; and HUD approval of the cost certificate.

(b) *Submission of cost certificate.*

(1) When an approved development or modernization activity is completed or when HUD terminates the activity, the PHA must submit to HUD the:

(i) Actual Development Cost Certificate (ADCC) within 12 months. For purposes of the CF ACC, costs incurred between the completion of the

development and DOFA becomes the actual development cost; and

(ii) Actual Modernization Cost Certificate (AMCC) for each grant, no later than 12 months after the expenditure deadline but no earlier than the obligation end date. A PHA with under 250 units with an approved CFP 5-Year Action Plan for use of 100 percent of the Capital Fund Grant in Operations may submit the cost certificate any time after the funds have been budgeted to operations and withdrawn, as described in § 905.314(l).

(2) If the PHA does not submit the cost certificate and the final CFP Annual Statement/Performance and Evaluation Report within the period prescribed in this section, HUD may impose restrictions on open Capital Fund grants, *e.g.*, establish review thresholds, set the grant to "auto review" (HUD automatically reviews it on a periodic basis), or suspend grants, until the cost certificate for the affected grant is submitted. These restrictions may be imposed by HUD after notification of the PHA.

(c) *Audit.* The cost certificate is a financial statement subject to audit pursuant to 24 CFR 85.26. After submission of the cost certificate to HUD, the PHA shall provide the cost certificate to its independent public auditor (IPA) as part of its annual audit. After audit, the PHA will notify HUD of the grants included in the audit, any exceptions noted by the PHA auditor, and the schedule to complete corrective actions recommended by the auditor.

(d) *Review and approval.* For PHAs exempt from the audit requirements, HUD will review and approve the cost certificate based on available information regarding the Capital Fund grant. For PHAs subject to an audit, HUD will review the information from the annual audit provided by the PHA and approve the certificate after all exceptions, if any, have been resolved.

(e) *Recapture.* All Capital Funds in excess of the actual cost incurred for the grant are subject to recapture. Any funds awarded to the PHA that are returned or any funds taken back from the PHA in a fiscal year after the grant was awarded are subject to recapture.

§ 905.324 Data reporting requirements.

The PHA shall provide, at minimum, the following data reports, at a time and in a form prescribed by HUD:

(a) The Performance and Evaluation Report as described in § 905.300(b)(8);

(b) Updates on the PHA's building and unit data as required by HUD;

(c) Reports of obligation and expenditure; and

(d) Any other information required for participation in the Capital Fund Program.

§ 905.326 Records.

(a) The PHA will maintain full and complete records of the history of each Capital Fund grant, including, but not limited to, CFP 5-Year Action Plans, procurement, contracts, obligations, and expenditures.

(b) The PHA shall retain all documents related to the activities for which the Capital Fund grant was received for 5 years after HUD approves either the actual development or modernization cost certificate, unless a longer period is required by applicable law.

(c) HUD and its duly authorized representatives shall have full and free access to all PHA offices, facilities, books, documents, and records, including the right to audit and make copies.

Subpart D—Capital Fund Formula

§ 905.400 Capital Fund formula (CF formula).

(a) *General.* This section describes the formula for allocating Capital Funds to PHAs.

(b) *Formula allocation based on relative needs.* HUD shall allocate Capital Funds to the PHAs in accordance with the CF formula. The CF formula measures the existing modernization needs and accrual needs of PHAs.

(c) *Allocation for existing modernization needs under the CF formula.* HUD shall allocate one-half of the available Capital Fund amount based on the relative existing modernization needs of PHAs, determined in accordance with paragraph (d) of this section.

(d) *PHAs with 250 or more units in FFY 1999, except the New York City and Chicago Housing Authorities.* The estimates of the existing modernization needs for these PHAs shall be based on the following:

(1) Objective measurable data concerning the following PHA, community, and project characteristics applied to each project:

(i) The average number of bedrooms in the units in a project (Equation co-efficient: 4604.7);

(ii) The total number of units in a project (Equation co-efficient: 10.17);

(iii) The proportion of units in a project in buildings completed in 1978 or earlier. In the case of acquired projects, HUD will use the DOFA unless the PHA provides HUD with the actual date of construction completion. When

the PHA provides the actual date of construction completion, HUD will use that date (or, for scattered sites, the average dates of construction of all the buildings), subject to a 50-year cap. (Equation co-efficient: 4965.4);

(iv) The cost index of rehabilitating property in the area (Equation co-efficient: -10608);

(v) The extent to which the units of a project were in a nonmetropolitan area as defined by the United States Bureau of the Census (Census Bureau) during FFY 1996 (Equation co-efficient: 2703.9);

(vi) The PHA is located in the Southern census region, as defined by the Census Bureau (Equation co-efficient: -269.4);

(vii) The PHA is located in the Western census region, as defined by the Census Bureau (Equation co-efficient: -1709.5);

(viii) The PHA is located in the Midwest census region as defined by the Census Bureau (Equation co-efficient: 246.2); and

(2) An equation constant of 13851.

(i) *Newly constructed units.* Units with a DOFA date of October 1, 1991, or after, shall be considered to have a zero existing modernization need.

(ii) *Acquired projects.* Projects acquired by a PHA with a DOFA date of October 1, 1991, or after, shall be considered to have a zero existing modernization need.

(3) *For New York City and Chicago Housing Authorities, based on a large sample of direct inspections.* Prior to the cost calibration in paragraph (d)(5) of this section, the number used for the existing modernization need of family projects shall be \$16,680 in New York and \$24,286 in Chicago, and the number for elderly projects shall be \$14,622 in New York and \$16,912 in Chicago.

(i) *Newly constructed units.* Units with a DOFA date of October 1, 1991, or after, shall be considered to have a zero existing modernization need.

(ii) *Acquired projects.* Projects acquired by a PHA with a DOFA date of October 1, 1991, or after, shall be considered to have a zero existing modernization need.

(4) *PHAs with fewer than 250 units in FFY 1999.* The estimates of the existing modernization need shall be based on the following:

(i) Objective measurable data concerning the PHA, community, and project characteristics applied to each project:

(A) The average number of bedrooms in the units in a project. (Equation coefficient: 1427.1);

(B) The total number of units in a project. (Equation coefficient: 24.3);

(C) The proportion of units in a project in buildings completed in 1978 or earlier. In the case of acquired projects, HUD shall use the DOFA date unless the PHA provides HUD with the actual date of construction completion, in which case HUD shall use the actual date of construction completion (or, for scattered sites, the average dates of construction of all the buildings), subject to a 50-year cap. (Equation coefficient: -1389.7);

(D) The cost index of rehabilitating property in the area, as of FFY 1999. (Equation coefficient: -20163);

(E) The extent to which the units of a project were in a nonmetropolitan area as defined by the Census Bureau during FFY 1996. (Equation coefficient: 6157.7);

(F) The PHA is located in the Southern census region, as defined by the Census Bureau. (Equation coefficient: 4379.2);

(G) The PHA is located in the Western census region, as defined by the Census Bureau. (Equation coefficient: 3747.7);

(H) The PHA is located in the Midwest census region as defined by the Census Bureau. (Equation coefficient: -2073.5); and

(ii) An equation constant of 24762.

(A) *Newly constructed units.* Units with a DOFA date of October 1, 1991, or after, shall be considered to have a zero existing modernization need.

(B) *Acquired projects.* Projects acquired by a PHA with a DOFA date of October 1, 1991, or after, shall be considered by HUD to have a zero existing modernization need.

(5) *Calibration of existing modernization need for cost index of rehabilitating property in the area.* The estimated existing modernization need determined under paragraphs (d)(1), (d)(2), or (d)(3) of this section shall be adjusted by the values of the cost index of rehabilitating property in the area.

(6) *Freezing of the determination of existing modernization need.* FFY 2008 is the last fiscal year that HUD will calculate the existing modernization need. The existing modernization need will be frozen for all developments at the calculation as of FFY 2008 and will be adjusted for changes in the inventory and paragraph (d)(4) of this section.

(e) *Allocation for accrual needs under the CF formula.* HUD shall allocate the other half of the remaining Capital Fund amount based on the relative accrual needs of PHAs, determined in accordance with this paragraph of this section.

(1) PHAs with 250 or more units, except the New York City and Chicago Housing Authorities. The estimates of

the accrual need shall be based on the following:

(i) Objective measurable data concerning the following PHA, community, and project characteristics applied to each project:

(A) The average number of bedrooms in the units in a project. (Equation coefficient: 324.0);

(B) The extent to which the buildings in a project average fewer than 5 units. (Equation coefficient: 93.3);

(C) The age of a project, as determined by the DOFA date. In the case of acquired projects, HUD shall use the DOFA date unless the PHA provides HUD with the actual date of construction completion, in which case HUD shall use the actual date of construction (or, for scattered sites, the average dates of construction of all the buildings), subject to a 50-year cap. (Equation coefficient: -7.8);

(D) Whether the development is a family project. (Equation coefficient: 184.5);

(E) The cost index of rehabilitating property in the area. (Equation coefficient: -252.8);

(F) The extent to which the units of a project were in a nonmetropolitan area as defined by the Census Bureau during FFY 1996. (Equation coefficient: -121.3);

(G) PHA size of 6,600 or more units in FFY 1999. (Equation coefficient: -150.7);

(H) The PHA is located in the Southern census region, as defined by the Census Bureau. (Equation coefficient: 28.4);

(I) The PHA is located in the Western census region, as defined by the Census Bureau. (Equation coefficient: -116.9);

(J) The PHA is located in the Midwest census region as defined by the Census Bureau. (Equation coefficient: 60.7); and

(ii) An equation constant of 1371.9.

(2) For the New York City and Chicago Housing Authorities, based on a large sample of direct inspections. Prior to the cost calibration in paragraph (e)(4) of this section the number used for the accrual need of family developments is \$1,395 in New York, and \$1,251 in Chicago, and the number for elderly developments is \$734 in New York and \$864 in Chicago.

(3) PHAs with fewer than 250 units. The estimates of the accrual need shall be based on the following:

(i) Objective measurable data concerning the following PHA, community, and project characteristics applied to each project:

(A) The average number of bedrooms in the units in a project. (Equation coefficient: 325.5);

(B) The extent to which the buildings in a project average fewer than 5 units. (Equation coefficient: 179.8);

(C) The age of a project, as determined by the DOFA date. In the case of acquired projects, HUD shall use the DOFA date unless the PHA provides HUD with the actual date of construction completion. When provided with the actual date of construction completion, HUD shall use this date (or, for scattered sites, the average dates of construction of all the buildings), subject to a 50-year cap. (Equation coefficient: -9.0);

(D) Whether the project is a family development. (Equation coefficient: 59.3);

(E) The cost index of rehabilitating property in the area. (Equation coefficient: -1570.5);

(F) The extent to which the units of a project were in a nonmetropolitan area as defined by the Census Bureau during FFY 1996. (Equation coefficient: -122.9);

(G) The PHA is located in the Southern census region, as defined by the Census Bureau. (Equation coefficient: -564.0);

(H) The PHA is located in the Western census region, as defined by the Census Bureau. (Equation coefficient: -29.6);

(I) The PHA is located in the Midwest census region as defined by the Census Bureau. (Equation coefficient: -418.3); and

(ii) An equation constant of 3193.6.

(4) *Calibration of accrual need for the cost index of rehabilitating property in the area.* The estimated accrual need determined under either paragraph (e)(2) or (e)(3) of this section shall be adjusted by the values of the cost index of rehabilitation.

(f) *Calculation of number of units.*

(1) *General.* For purposes of determining the number of a PHA's public housing units and the relative modernization needs of PHAs:

(i) HUD shall count as one unit:

(A) Each public housing and section 23 bond-financed CF unit, except that each existing unit under the Turnkey III program shall count as one-fourth of a unit. Units receiving operating subsidy only shall not be counted.

(B) Each existing unit under the Mutual Help program.

(ii) HUD shall add to the overall unit count any units that the PHA adds to its inventory when the units are under CF ACC amendment and have reached DOFA by the date that HUD establishes for the FFY in which the CF formula is being run (hereafter called the "reporting date"). New CF units and reaching DOFA after the reporting date

shall be counted for CF formula purposes in the following FFY.

(2) *Replacement units.* Replacement units newly constructed on or after October 1, 1998, that replace units in a project funded in FFY 1999 by the Comprehensive Grant formula system or the Comprehensive Improvement Assistance Program (CIAP) formula system shall be given a new CF ACC number as a separate project and shall be treated as a newly constructed development as outlined in § 905.600.

(3) *Reconfiguration of units.* Reconfiguration of units may cause the need to be calculated by the new configuration based on the formula characteristics in the building and unit's module of PIC (refer to the formula sections here). The unit counts will be determined by the CF units existing after the reconfiguration.

(4) *Reduction of units.* For a project losing units as a result of demolition and disposition, the number of units on which the CF formula is based shall be the number of units reported as eligible for Capital Funds as of the reporting date. Units are eligible for funding until they are removed due to demolition and disposition in accordance with a schedule approved by HUD.

(g) *Computation of formula shares under the CF formula.* (1) *Total estimated existing modernization need.* The total estimated existing modernization need of a PHA under the CF formula is the result of multiplying for each project the PHA's total number of formula units by its estimated existing modernization need per unit, as determined by paragraph (d) of this section, and calculating the sum of these estimated project needs.

(2) *Total accrual need.* The total accrual need of a PHA under the CF formula is the result of multiplying for each project the PHA's total number of formula units by its estimated accrual need per unit, as determined by paragraph (e) of this section, and calculating the sum of these estimated accrual needs.

(3) *PHA's formula share of existing modernization need.* A PHA's formula share of existing modernization need under the CF formula is the PHA's total estimated existing modernization need divided by the total existing modernization need of all PHAs.

(4) *PHA's formula share of accrual need.* A PHA's formula share of accrual need under the CF formula is the PHA's total estimated accrual need divided by the total existing accrual need of all PHAs.

(5) *PHA's formula share of capital need.* A PHA's formula share of capital need under the CF formula is the

average of the PHA's share of existing modernization need and its share of accrual need (by which method each share is weighted 50 percent).

(h) *CF formula capping.* (1) For units that are eligible for funding under the CF formula (including replacement housing units discussed below), a PHA's CF formula share shall be its share of capital need, as determined under the CF formula, subject to the condition that no PHA's CF formula share for units funded under CF formula can be less than 94 percent of its formula share had the FFY 1999 formula system been applied to these CF formula eligible units. The FFY 1999 formula system is based upon the FFY 1999 Comprehensive Grant formula system for PHAs with 250 or more units in FFY 1999 and upon the FFY 1999 Comprehensive Improvement Assistance Program (CIAP) formula system for PHAs with fewer than 250 units in FFY 1999.

(2) For a Moving to Work (MTW) PHA whose MTW agreement provides that its CF formula share is to be calculated in accordance with the previously existing formula, the PHA's CF formula share, during the term of the MTW agreement, may be approximately the formula share that the PHA would have received had the FFY 1999 formula funding system been applied to the CF formula eligible units.

(i) *RHF to reflect formula need for developments with demolition, or disposition occurring on or after October 1, 1998.*

(1) *RHF generally.* PHAs that have a reduction in the number of units attributable to demolition or disposition of units during the period (reflected in data maintained by HUD) that lowers the formula unit count for the CFF calculation qualify for application of a replacement housing factor, subject to satisfaction of criteria stated in paragraph (i)(5) of this section

(2) *When applied.* The RHF will be added, where applicable:

(i) For the first 5 years after the reduction of units described in paragraph (i)(1) of this section; and

(ii) For an additional 5 years if the planning, leveraging, obligation, and expenditure requirements are met. As a prior condition of a PHA's receipt of additional funds for replacement housing provided for the second 5-year period or any portion thereof, a PHA must obtain a firm commitment of substantial additional funds other than public housing funds for replacement housing, as determined by HUD.

(3) *Computation of RHF.* The RHF consists of the difference between the CFF share without the CFF share

reduction of units attributable to demolition or disposition, and the CFF share that resulted after the reduction of units attributable to demolition or disposition.

(4) *Replacement housing funding in FFY 1998 and 1999.* Units that received replacement housing funding in FFY 1998 will be treated as if they had received 2 years of replacement housing funding by FFY 2000. Units that received replacement housing funding in FFY 1999 will be treated as if they had received one year of replacement housing funding as of FFY 2000.

(5) *PHA Eligibility for the RHF.* A PHA is eligible for this factor only if the PHA satisfies the following criteria:

(i) The PHA requests the application of the replacement housing factor;

(ii) The PHA will use the funding in question only for replacement housing;

(iii) The PHA will use the restored funding that results from the use of the replacement factor to provide replacement housing in accordance with the PHA's 5-Year Plan, as approved by HUD under part 903 of this chapter;

(iv) The PHA has not received funding for public housing units that will replace the lost units under Public Housing Development, and Major Reconstruction of Obsolete Public Housing, HOPE VI, or programs that otherwise provide for replacement with public housing units;

(v) The PHA, if designated troubled by HUD, and not already under the direction of HUD or an appointed receiver, in accordance with part 902 of this chapter, uses an Alternative Management Entity as defined in part 902 of this chapter, for development of replacement housing and complies with any applicable provisions of its Memorandum of Agreement executed with HUD under that part; and

(vi) The PHA undertakes any development of replacement housing in accordance with applicable HUD requirements and regulations.

(6) *Failure to provide replacement housing in a timely fashion.*

(i) A PHA will be subject to the actions described in paragraph (i)(7)(ii) of this section if the PHA does not:

(A) Use the restored funding that results from the use of the RHF to provide replacement housing in a timely fashion as provided in paragraph (i)(7)(i) of this section and in accordance with applicable HUD requirements and regulations, and

(B) Make reasonable progress on such use of the funding, in accordance with applicable HUD requirements and regulations.

(ii) If a PHA fails to act as described in paragraph (i)(6)(i) of this section,

HUD will require appropriate corrective action under these regulations, may recapture and reallocate the funds, or may take other appropriate action.

(7) Requirement to obligate and expend RHF funds within specified period.

(i) In addition to the requirements otherwise applicable to obligation and expenditure of funds, PHAs are required to obligate assistance received as a result of the RHF within:

(A) 24 months from the date that funds become available to the PHA; or

(B) With specific HUD approval, 24 months from the date that the PHA accumulates adequate funds to undertake replacement housing.

(ii) To the extent the PHA has not obligated any funds provided as a result of the RHF within the time frames required by this paragraph, or has not expended such funds within a reasonable time, HUD shall reduce the amount of funds to be provided to the PHA as a result of the application of the second 5 years of the replacement housing factor.

(j) *RHF to reflect formula need for developments with demolition, disposition, or sale for homeownership occurring on or after October 1, 2009.*

(1) *RHF generally.* In FFY 2011 and thereafter, PHAs that have a reduction in the number of units occurring in FFY 2010 and attributable to demolition, disposition, or sale of homeownership under section 32 of the U.S. Housing Act of 1937, 42 U.S.C. 1437z-4 (section 32), or former section 5(h) of the U.S. Housing Act of 1937 (42 U.S.C. 1437c(h) (1994) (former section 5(h)), HOPE I, or as otherwise approved by HUD, but excluding homeownership under Turnkey III, are automatically eligible to receive RHF grants for a 5-year period, subject to the criteria stated in paragraph (j)(4) of this section. The funding reductions attributable to homeownership apply in instances where the units proposed for homeownership under section 32, former section 5(h), HOPE I, or as otherwise approved by HUD have been in the public housing inventory for a minimum of 5 years.

(2) *When applied.* The RHF will be added, where applicable, for 5 years after the reduction of units described in paragraph (j)(1) of this section.

(3) *Computation of RHF.* The RHF consists of the difference between the CFF share without the CFF share reduction of units attributable to demolition, disposition, or sale for homeownership under section 32, former section 5(h), HOPE I or as otherwise approved by HUD and the CFF share that resulted after the

reduction of units attributable to demolition, disposition, or sale for homeownership under section 32, former section 5(h), HOPE I, or as otherwise approved by HUD.

(4) *PHA eligibility for the RHF.* A PHA is eligible for this factor only if the PHA satisfies the following criteria:

(i) The PHA will automatically receive the RHF for reduction of units in accordance with (j)(1), unless the PHA rejects the RHF funding for that fiscal year in writing;

(ii) The PHA will use the funding in question for replacement housing, *i.e.*, development of public housing rental and/or homeownership units;

(iii) The PHA will use the restored funding that results from the use of the replacement factor to provide replacement housing in accordance with the PHA's CFP 5-Year Action Plan.

(iv) The PHA has not received funding for public housing units that will replace the lost units under Public Housing Development, and Major Reconstruction of Obsolete Public Housing, HOPE VI, or programs that otherwise provide for replacement with public housing units;

(v) The PHA, if designated troubled by HUD, and not already under the direction of HUD or an appointed receiver, in accordance with part 902 of this chapter, uses an Alternative Management Entity, as defined in part 902 of this chapter, for development of replacement housing and complies with any applicable provisions of its Memorandum of Agreement executed with HUD under that part; and

(vi) The PHA undertakes any development of replacement housing in accordance with applicable HUD requirements and regulations.

(5) Failure to provide replacement housing in a timely fashion.

(i) A PHA will be subject to the actions described in paragraph (j)(6)(ii) of this section if the PHA does not:

(A) Use the restored funding that results from the use of the RHF to provide replacement housing in a timely fashion as provided in paragraph (j)(6)(i) of this section and in accordance with applicable HUD requirements and regulations, and

(B) Make reasonable progress on such use of the funding, in accordance with applicable HUD requirements and regulations.

(ii) If a PHA fails to act as described in paragraph (j)(5)(i) of this section, HUD will require appropriate corrective action under these regulations, may recapture and reallocate the funds, or may take other appropriate action.

(6) Requirement to obligate and expend RHF funds within specified period.

(i) In addition to the requirements otherwise applicable to obligation and expenditure of funds, PHAs are required to obligate funds received as a result of the RHF within:

(A) 24 months from the date that funds become available to the PHA; or

(B) With specific HUD approval, 24 months from the date that the PHA accumulates adequate funds to undertake replacement housing.

(ii) To the extent the PHA has not obligated any funds provided as a result of the RHF within the time frames required by this paragraph, or expended such funds within a reasonable time frame, HUD shall reduce the amount of funds to be provided to the PHA.

(k) Performance reward factor.

(1) *High performer.* A PHA that is designated a high performer under the PHA's most recent final PHAS score may receive a performance bonus that is:

(i) 3 percent above its base formula amount in the first 5 years these awards are given (for any year in this 5-year period in which the performance reward is earned); or

(ii) 5 percent above its base formula amount in future years (for any year in which the performance reward is earned);

(2) *Condition.* The performance bonus is subject only to the condition that no PHA will lose more than 5 percent of its base formula amount as a result of the redistribution of funding from non-high performers to high performers.

(3) *Redistribution.* The total amount of Capital Funds that HUD has recaptured or not allocated to PHAs as a sanction for violation of expenditure and obligation requirements shall be allocated to the PHAs that are designated high performers under PHAS.

Subpart E—Use of Capital Funds for Financing [Reserved]

Subpart F—Development Requirements

§ 905.600 General.

(a) *Applicability.* This subpart F applies to the development of public housing units to be included under an ACC and receive Capital and/or Operating Funds. PHAs must comply with all of the requirements in this part, as applicable. Pursuant to § 905.106, when a PHA or owner/management entities and its partners submit and execute a development proposal and, if applicable, a site acquisition proposal,

and submit an executed ACC Amendment covering those same units, it is deemed to have certified by those executed submissions its past, current, and future compliance with this subpart. Noncompliance with any provision of this part or other applicable statutes or regulations, or the ACC, Amendment, and any Amendment thereto may subject the PHA and/or its partners to sanctions contained in § 905.804.

(b) *Description.* A PHA may develop public housing through the construction of new units or the acquisition of existing units that may or may not require rehabilitation prior to occupancy. As noted in paragraph (c) of this section, a PHA may use a variety of funding sources to develop public housing. When developing new public housing with Capital Funds, pursuant to 24 CFR 905.304, the term of the ACC Amendment will be 40 years. However, a PHA may develop a mixed-financed project with no public housing funds used for construction of the units and receive only Operating Fund assistance for an ACC term, as determined by HUD pursuant to section 9(e) of the 1937 Act (42 U.S.C. 1437(g)(e) and 24 CFR 905.604(k)).

(c) *Capital Fund Financing.* For Capital Fund Financing, only the general development process will be as follows:

(1) The PHA must include any public housing development in its CFP 5-Year Action Plan.

(2) After approval of the CFP 5-Year Action Plan by HUD, the PHA will contract for services necessary to develop the project.

(d) *All financing.* For all financing, the general development process will be as follows:

(1) The PHA or partner will locate properties and/or sites, prepare plans and specifications, and obtain HUD approval of the site acquisition and development proposals.

(2) Upon HUD approval of the development proposal, HUD and the PHA must execute the ACC Amendment and the PHA will enter the applicable project information into HUD's data systems. The PHA may request predevelopment funding necessary for preparation of the development proposal, as described in § 905.612(a).

(3) After HUD approval of the development and/or site acquisition proposals, the PHA and/or its partner will acquire sites and/or properties, and record the Declaration of Trust/Declaration of Restrictive Covenants for all properties acquired. After HUD approval of the development proposal, the PHA and/or its partner will solicit

construction bids, and award contracts and construct the units.

(4) Upon completion of the project, the PHA will establish the DOFA. After the DOFA, the PHA will submit a cost certificate to HUD attesting to the actual cost of the project that will be subject to audit.

(e) *Funding sources.* A PHA may engage in development activities using any one or a combination of the following sources of funding:

(1) Capital Funds;

(2) HOPE VI funds;

(3) Proceeds from the sale of units under a homeownership program in accordance with 24 CFR part 906;

(4) Proceeds resulting from the disposition of PHA-owned land or improvements;

(5) Private financing used in accordance with § 905.604, Mixed Financed Development;

(6) Capital Fund Financing Program (CFFP) proceeds under § 905.500;

(7) Operating Funds pursuant to an Operating Fund Financing Program (OFFP) approved by HUD pursuant to 24 CFR part 990; and

(8) Funds available from any other source.

§ 905.602 Program requirements.

(a) *Local cooperation.* Except as provided under § 905.604(d) for mixed-finance projects, the PHA must enter into a Cooperation Agreement with the applicable local governing body that includes sufficient authority to cover the public housing being developed under this subpart, or provide an opinion of counsel that the existing, amended, or supplementary cooperation agreement between the jurisdiction and the PHA includes the project or development.

(b) *New construction limitation.* These requirements apply to the construction of public housing and are not applicable to development of public housing through the acquisition of existing housing. All proposed new construction projects must meet both of the following requirements:

(1) *Limitation on the number of units.* A PHA may not use Capital Funds to pay for the construction cost of public housing units if such construction would result in a net increase in the number of public housing units that the PHA owned, assisted, or operated on October 1, 1999. A PHA may develop public housing units in excess of the limitation if:

(i) The units are available and affordable to eligible low-income families and the CF formula does not provide additional funding for the specific purpose of allowing

construction and operation of such excess units; or

(ii) The units are part of a mixed-finance project or otherwise leverage significant additional investment, and the cost of the useful life of the projects is less than the estimated cost of providing tenant-based assistance under section 8(o) of the 1937 Act.

(2) *Limitations on cost.* A PHA may not construct public housing unless the cost of construction is less than the cost of acquisition or acquisition and rehabilitation of existing units, including the amount required to establish, as necessary, an upfront reserve for replacement accounts for major repairs. A PHA shall provide evidence of compliance with this subpart either by:

(i) Demonstrating through a cost comparison that the cost of new construction in the neighborhood where the PHA proposes to construct the housing is less than the cost of acquisition of existing housing with or without rehabilitation in the same neighborhood; or

(ii) Documenting that there is insufficient existing housing in the neighborhood to acquire.

(c) *Federalization.* Existing PHA-owned nonpublic housing properties financed with or without city or state funds may not be federalized, as described in section 9(n) of the 1937 Act (*see* 42 U.S.C. 1437g(n)), under a public housing CF ACC under this part, or by any other means.

(d) *Site and neighborhood standards.* Each proposed site to be newly acquired for a public housing project or for construction or rehabilitation of public housing must be reviewed and approved by the Field Office as meeting the following standards, as applicable:

(1) The site must be adequate in size, exposure, and contour to accommodate the number and type of units proposed. Adequate utilities (*e.g.*, water, sewer, gas, and electricity) and streets shall be available to service the site.

(2) The site and neighborhood shall be suitable to facilitating and furthering full compliance with the applicable provisions of Title VI of the Civil Rights Act of 1964, Title VIII of the Civil Rights Act of 1968, Executive Order 11063, and HUD regulations issued under these statutes.

(3) The site for new construction shall not be located in an area of minority concentration unless:

(i) There are sufficient, comparable opportunities outside the areas of minority concentration for housing minority families in the income range that are to be served by the proposed project; or

(ii) The project is necessary to meet overriding housing needs that cannot otherwise feasibly be met in that housing market area. "Overriding housing needs" shall not serve as the basis for determining that a site is acceptable if the only reason that these needs cannot otherwise feasibly be met is that, due to discrimination because of race, color, religion, creed, sex, disability, familial status, or national origin, sites outside areas of minority concentration are unavailable.

(4) The site for new construction shall not be located in a racially mixed area if the project will cause a significant increase in the proportion of minority to nonminority residents in the area.

(5) Notwithstanding the foregoing, after demolition of public housing units a PHA may construct public housing units on the original public housing site or in the same neighborhood if the number of replacement public housing units is significantly fewer than the number of units demolished. One of the following criteria must be satisfied:

(i) The number of public housing units being constructed is not more than 50 percent of the number of units in the original development; or

(ii) In the case of replacing an occupied development, the number of public housing units being constructed is the minimum number needed to house current residents that want to remain at the site, so long as the number of units is significantly fewer than the number being demolished; or

(iii) The public housing units being constructed constitute no more than 25 units.

(6) The site shall promote greater choice of housing opportunities and avoid undue concentration of assisted persons in areas containing a high proportion of low-income persons.

(7) The site shall be free from adverse environmental conditions, natural or manmade, such as: Toxic or contaminated soils and substances; mudslide or other unstable soil conditions; flooding; septic tank backups or other sewage hazards; harmful air pollution or excessive smoke or dust; excessive noise or vibration from vehicular traffic; insect, rodent or vermin infestation; or fire hazards. The neighborhood shall not be seriously detrimental to family life. It shall not be filled with substandard dwellings nor shall other undesirable elements predominate, unless there is a concerted program in progress to remedy the undesirable conditions.

(8) Through the use of public transportation, the site shall be accessible to social, recreational, educational, commercial, health

facilities, health services, and other municipal facilities and services that are at least equivalent to those typically found in neighborhoods consisting largely of similar unassisted standard housing.

(9) Through the use of public transportation, the site shall be accessible to a range of jobs for low-income workers and for other needs.

(10) The project may not be built on a site that has occupants unless the relocation requirements at § 905.308(b)(9) are met.

(11) The site shall not be in an area that HUD has identified as having special flood hazards and in which the sale of flood insurance has been made available under the National Flood Insurance Act of 1968, unless the development is covered by flood insurance required by the Flood Disaster Protection Act of 1973 and meets all applicable HUD standards and local requirements.

§ 905.604 Mixed-finance development.

(a) *General.* A PHA may use a combination of private financing and/or other public funds and Capital Funds to develop public housing units. There are many potential scenarios for ownership and transaction structures, ranging from the PHA or its partner(s) holding no ownership interest, a partial ownership interest, or 100 percent of the ownership of public housing units that are to be developed.

(1) PHAs and/or their partner(s) may choose to enter into a partnership or other contractual arrangement with a third entity for the mixed-financed development and/or ownership of public housing units. If this entity has primary responsibility along with the PHA for the development of these units, it is referred to for purposes of this subpart as the PHA's "partner." The entity, other than the PHA itself that ultimately owns the public housing units, whether or not the PHA retains an ownership interest, is referred to as the "owner entity."

(2) The resulting "mixed-financed" developments may consist of 100 percent public housing units or may consist of public and nonpublic housing units. The term "mixed-finance development" applies to all projects developed by an owner entity regardless of whether there is a combination of private or other public sources. The term "mixed-finance modernization" applies to public housing projects modernized using the mixed-finance method. Projects developed by ownership entities that are modernized using the mixed-finance method shall maintain the DOFA that existed prior to

mixed-finance modernization. Projects modernizing using the mixed-finance method shall have a covenant to maintain and operate the project as public housing pursuant to 24 CFR 905.304(a)(2). In addition, if a PHA decides to limit the term of the ACC by receiving Operating Fund or Capital Fund Only assistance, as described in § 905.600(b) and (c), it must follow the general development procedures discussed in this subpart.

(b) *Definitions applicable to this section—(1) Development.* A housing facility consisting of public housing units and that may also consist of nonpublic housing units, that has been developed, or that will be developed, using mixed-finance strategies under this subpart.

(2) *Mixed-finance.* The use of publicly and/or privately financed sources of funds for development under this subpart, owned by an owner entity of public housing units.

(3) *Owner entity.* The owner entity is the entity that will own the public units, if the PHA holds less than 100 percent of the ownership interest. The owner entity may be a partnership in which the PHA owns a partnership interest.

(4) *Participating party.* Any person, firm, corporation, or public or private entity that:

(i) Agrees to provide financial or other resources to carry out the approved proposal or specified activities in the proposal; or

(ii) Otherwise participates in the development and/or operation of the public housing units and will receive funds derived from HUD with respect to such participation. The term "participating party" includes an owner entity or partner.

(5) *Partner.* A third-party entity with which the PHA has entered into a partnership or other contractual arrangement to provide for the mixed-finance development of public housing units pursuant to this subpart. The Partner has primary responsibility with the PHA for the development and operation of public housing units under the terms of the approved proposal and in compliance with the applicable Public Housing Requirements.

(6) *PHA instrumentality.* An Instrumentality is an entity related to the PHA whose assets, operations, and management are legally and effectively controlled by the PHA, and through which PHA functions or policies are implemented, and which utilizes public housing funds or public housing assets for the purpose of carrying out public housing development functions of the PHA. For the Department's purposes, an Instrumentality assumes the role of the

PHA and is the PHA under the Public Housing Requirements for purposes of implementing public housing development activities and programs. Instrumentalities must be authorized to act for and to assume such responsibilities. In addition, an Instrumentality must abide by the Public Housing Requirements that would be applicable to the PHA.

(c) *Structure of projects.* Each mixed-finance project shall be developed in a manner that:

(1) Ensures the continued operation of public housing in accordance with all Public Housing Requirements; and

(2) Will bear the approximate same proportion to the total number of units in the mixed-financed project as the value of the total financial commitment provided by the PHA bears to the total financial commitment of the project, or shall not be less than the number of units that could have been developed under the conventional public housing program with the assistance, or as otherwise approved by the Secretary.

(d) *Process.* Development of a mixed-finance project under this subpart is similar to the development of public housing financed entirely with Capital Funds. PHAs will be expected to submit development and site acquisition proposals as identified in §§ 905.606 and 905.608. There are unique provisions applicable to mixed-finance projects that are further explained in this section.

(e) *Local cooperation.* A PHA may elect to exempt all public housing units in a mixed-finance project from provisions under section 6(d) of the Act and from the finding of need and cooperative agreement provisions under sections 5(e)(1)(ii) and (e)(2) of the Act, 42 U.S.C. 1437c(e)(1)(ii) and (e)(2), and instead subject units to local real estate taxes, but only if the development of the units is not inconsistent with the jurisdiction's comprehensive housing affordability strategy. If no election is made, the Cooperation Agreement as provided in 905.602(a) is required.

(f) *Conflicts.* In the event of a conflict between the requirements for a mixed-finance project and other requirements of this subpart, the mixed-finance public housing requirements shall apply, unless HUD determines otherwise in writing.

(g) *HUD approval.* For purposes of this section only, any action or approval that is required by HUD pursuant to the requirements set forth in this section shall be construed to mean HUD Headquarters, unless the Field Office is authorized in writing by Headquarters to carry out a specific function in this section.

(h) *Irrevocable financial commitment.* Irrevocability of funds means that binding legal documents, such as loan agreements, mortgages/deeds of trust, partnership agreements or operating agreements or similar documents committing funds have been executed by the applicable parties, though disbursement of such funds may be subject to meeting progress milestones, the absence of default, and other commercially reasonable conditions precedent under such documents. For projects involving revolving loan funds, the irrevocability of funds means that funds in an amount identified to HUD as the maximum revolving loan have been committed pursuant to legally binding documents, though disbursement of such funds may be subject to meeting progress milestones, the absence of default, and other commercially reasonable conditions precedent under such documents. The PHA must ensure the availability of the participating party or parties' financing, the amount and source of financing committed to the proposal by the participating party or parties, and the irrevocability of those funds.

(1) To ensure the irrevocable nature of the committed funds, the PHA shall: Review the legal documents committing such funds to ensure that the progress milestones and conditions precedent contained in such contracts are commercially reasonable, as commonly accepted by the industry; that the PHA and/or its ownership entity are ready, willing, and able to attain such milestones and comply with such preconditions; and confirm, after conducting sufficient due diligence, that such documents are properly executed by persons or entities legally authorized to bind the entity committing such funds.

(2) The PHA is not required to ensure the availability of funds by enforcing documents to which it is not a party.

(3) The PHA may certify as to the irrevocability of funds through the submission of an opinion of the PHA's counsel attesting that counsel has examined the availability of the participating party or parties' financing, and the amount and source of financing committed to the proposal by the participating party or parties, and has determined that such financing has been irrevocably committed by the participating party or parties for use in carrying out the proposal, and that such commitment is in the amount required under the terms of the proposal.

(i) *Comparability.* Public housing units built in a mixed-financed development must be comparable in size, location, external appearance, and

distribution to nonpublic housing units within the development.

(j) *Mixed-finance procurement.* The requirements of 24 CFR part 85 and 24 CFR 905.316 are applicable to this subpart with the following exceptions:

(1) PHA may select a development partner using competitive proposals procedures for qualifications-based procurement, subject to negotiation of fair and reasonable compensation, and compliance with TDC and other applicable cost limitations;

(2) An owner entity (which, as a private entity, would normally not be subject to 24 CFR part 85) shall be required to comply with 24 CFR part 85 if HUD determines that the PHA or PHA Instrumentality or either of their members or employees exercises significant decision-making functions within the owner entity with respect to managing the development of the proposed units. HUD may, on a case-by-case basis, exempt such an owner entity from the need to comply with 24 CFR part 85 if it determines that the owner entity has developed an acceptable alternative procurement plan.

(k) *Operating Fund and Capital Fund only assistance.* (1) General. PHAs and their partners may develop public housing without the use of Capital Funds but for which the PHA agrees to provide only Operating Fund assistance. These Operating Fund-only newly developed units will be included in the calculation of the Capital Fund formula in § 905.400. Where the PHA elects in the future to use Capital Funds for modernization of Operating Fund only units, the PHA must sign an ACC Amendment with a 20-year use restriction and record a Declaration of Trust in accordance with § 905.304. In addition, PHAs and their partners may develop public housing without the use of Operating Funds but for which the HUD and the PHA agree to provide only Capital Fund assistance for the development of new units, or, annually, in the future, for modernization and capital improvements, and the PHA must sign an ACC Amendment with a 40-year use restriction for development of new units and a 20-year use restriction for modernization and capital improvements and record a Declaration of Trust in accordance with § 905.304.

(2) ACC Term and Formula. (i) The term of the mixed-finance ACC amendment will be determined based on the assistance as provided in § 905.304. For units constructed with the benefit of public housing capital assistance, there shall be no disposition of the public housing units without the prior written approval of HUD during a 40-year period and the public housing

units shall be maintained and operated in accordance with all applicable Public Housing Requirements (including the ACC), as required by section 9(d)(3) of the Act, 42 U.S.C. 1437g(d)(3), as those requirements may be amended from time to time. For Operating Fund only units, there shall be no disposition of the public housing units without the prior written approval of HUD during, and for 10 years after the end of, the period in which the public housing units receive operating subsidy from the PHA, as required by 42 U.S.C.

1437g(e)(3), as those requirements may be amended from time to time. For units modernized with Capital Funds, the PHA would have to execute an ACC Amendment providing for no disposition of the public housing units without the prior written approval of HUD during a 20-year period, and the public housing units shall be maintained and operated in accordance with all applicable Public Housing Requirements (including the ACC), as required by 42 U.S.C. 1437g(d)(3), as those requirements may be amended from time to time.

(ii) If the PHA is no longer able to provide Operating Fund assistance, the PHA (on behalf of the owner entity) may request to terminate the CF ACC early. Where the ACC is terminated early, the PHA must provide the resident with a decent, safe, sanitary, and affordable unit to which he or she can relocate, which may include a public housing unit in another development or a Housing Choice Voucher, and pay for the tenant's reasonable moving costs. The URA is not applicable in this situation.

(3) Procedures. PHAs and their partners will develop Operating Fund only or Capital Fund only projects in accordance with this part by submitting development proposals, site acquisition proposals, and closing documents, except that the development proposals submitted, pursuant to § 905.606, need only address § 905.606(a), (b) (c), (j), (k), and (l). Upon HUD approval of the development proposal and closing documents, the PHA and HUD will execute a Mixed-Finance Amendment to the ACC for Operating Fund only or Capital Fund only assistance projects.

(l) [Reserved]

(m) [Reserved]

(n) *Mixed-finance operations—Deviation from HUD requirements pursuant to section 35 (h) of the 1937 Act.*

(1) An entity that develops, owns, and operates a mixed-finance development in which 20 percent or more of the units are for the rental of nonpublic housing may include a provision in the

agreement that it may deviate from the requirements of the Mixed-Finance ACC and applicable public housing regulations regarding rents and income eligibility, as provided in paragraph (n)(2) of this section, only when there is a reduction in appropriations under section 9(e) of the 1937 Act (see 42 U.S.C. 1437g(e)), or any other change in law preventing the PHA from providing Operating Funds as provided in its contractual agreement with the entity.

(2) *Allowable deviations.* The agreement may provide for deviations from Public Housing Requirements as follows:

(i) Increased public housing tenant rents, to the extent necessary to preserve the viability of units.

(ii) The owner entity rents vacant public housing units to persons who earn more than 80 percent of the adjusted median income (AMI) or to persons who are paying more than 30 percent adjusted income for rent.

(iii) If an owner determines that the amount of income being generated after renting the vacant public housing units is still insufficient to cover the projected shortfall in operating subsidies and if the owner has expended all operating subsidy reserve funds put aside for such eventuality, the owner may give written notice to the public housing residents that the owner intends to increase the rent being charged for the unit. In this case, the owner may increase the amount of the public housing rent above the amount established under section 3 of the Act, 42 U.S.C. 1437a, but any increased rental charges must be strictly limited to the amount needed to meet the projected shortfall in operating subsidies.

(iv) If, after notifying public housing residents of a proposed rent increase under § 905.604(n)(2)(iii) of this section, the resident is unable to remain in the unit because the new rent is more than 40 percent of the tenant's income, the PHA must provide the resident with a decent, safe, sanitary, and affordable unit to which he or she can relocate, which may include a public housing unit in another development or a Housing Choice Voucher, and pay for the tenant's reasonable moving costs. The URA is not applicable in this situation. Pending the tenant's relocation to another unit, the owner may not evict the tenant for nonpayment of rent if the reason for the eviction is the resident's inability to pay the incremental increase in rent under § 905.604(n)(2)(iii) of this section.

(v) The owner must have included in each of its leases with public housing residents in the mixed-finance development a disclosure that the

residents may be required to pay a higher rent for the unit, or to relocate to another unit, and specific conditions under which a higher rent might be charged; that is, a change in subsidy under section 9 of the Act, 42 U.S.C. 1437g, or other applicable law.

(3) *Alternative management plan.* If the agreement between the PHA and the entity contains a provision permitting a deviation from the Public Housing Requirements pursuant to section 35(h) of the 1937 Act and this part, the alternative management plan between the PHA and the entity must be approved by HUD before the implementation of such plan. The plan must contain the following:

(i) A statement describing the owner's reasons for invoking the alternative management plan (and, if the plan is being invoked because of changes in applicable law(s), a statement as to how the statutory changes will materially affect the viability of the public housing units);

(ii) An explanation of the owner's proposed remedies including, but not limited to:

(A) How the owner will select the residents (including a statement of their income levels) and units to be affected by the proposed remedies;

(B) The number and income levels of the families proposed to be admitted to those public housing units;

(C) The owner's timetable for implementing the proposed remedies in the alternative management plan;

(iii) An amended agreement between the Owner and PHA that includes provisions ensuring that:

(A) The alternative management plan is reevaluated and approved annually by HUD to ensure that implementation of the remedies continues to be appropriate;

(B) The owner complies with the requirements of this part in its management and operation of the public housing units following the invocation of remedies;

(C) The owner returns to the PHA any income that is generated by the public housing units in excess of the owner's expenses on behalf of those units, as a result of its invocation of remedies;

(D) The owner reinstates all Public Housing Requirements (including rent and income eligibility requirements) with respect to the original number of public housing units and number of bedrooms, in the mixed-finance development following the PHA's reinstatement of operating subsidies at the level originally agreed to in the regulatory and operating agreement; and

(E) The owner provides written notice to each of the public housing residents

in the mixed-finance development of its intention to invoke remedies under a submitted alternative management plan. Such notice must comply with all relevant federal, state, and local substantive and procedural requirements and, at a minimum, must provide public housing residents with 90 days advance notice of any proposal to increase rents or to relocate public housing residents to alternative housing.

(iv) Additional evidence. The PHA must provide documentation that:

(A) The revenues being generated by the public housing units (in combination with the reduced allocation of operating subsidy) are inadequate to cover the reasonable and necessary operating expenses of the public housing units;

(B) The deficit in operating revenues is attributable solely to the reduction in operating subsidy for the public housing units;

(C) A demonstration that the PHA cannot meet its contractual obligation;

(D) The reduction in appropriations under section 9 of the 1937 Act or other changes in applicable law materially affects the viability of the public housing units; and

(E) The owner has attempted to offset the impact of reduced operating subsidies, or changes in applicable law, by expending more than 50 percent of the funds from any operating reserve that may have been established on behalf of the public housing units.

(4) *HUD review.* HUD will review the alternative management plan to ensure that the plan meets the requirements of this subpart, and that any proposed deviation from standard Public Housing Requirements will be implemented only to the extent necessary to preserve the viability of the public housing units, while maintaining the low-income character of the units to the maximum extent practicable. HUD will complete its review of the alternative management plan and provide a decision within 30 days of its receipt. HUD may disapprove a PHA's request, made on behalf of the owner, to invoke or continue remedies under the alternative management plan for any of the following reasons:

(i) That the circumstances upon which the owner's request to invoke remedies under the plan are premised do not qualify in accordance with section 35(h) of the Act (42 U.S.C. 1437z-7(h)), as determined by HUD, or that the original circumstances that triggered the remedies no longer continue to apply;

(ii) In HUD's sole discretion, the owner's proposed deviation(s) from standard Public Housing Requirements are not limited to the maximum extent

practicable to preserving the viability of the public housing units and maintaining the low-income character of those units;

(iii) HUD has factual information available to it that contradicts the PHA's and/or the owner's assertions that each of the required preconditions for invoking remedies has been satisfied; or

(iv) HUD has evidence that the proposed alternative management plan is not in compliance with the civil rights laws, including the requirement to affirmatively further fair housing.

(5) *HUD reevaluation and reapproval.* HUD reevaluation and reapproval of the alternative management plan is required annually once an owner has invoked remedies under an alternative management plan, in order to ensure that the circumstances originally triggering the need for such remedies, as well as the scope of the remedies, remain valid and appropriate.

§ 905.606 Development proposal.

(a) In order to develop any public housing, including mixed-finance public housing for rental occupancy, the PHA shall submit a development proposal, in the form prescribed by HUD. The development proposal shall include some or all of the following documentation, as deemed necessary by HUD. Failure to submit and obtain HUD approval may result in the Capital Funds used in conjunction with the project being deemed to be ineligible expenses. In determining the amount of information to be submitted by the PHA, HUD shall consider whether the documentation is required for HUD to carry out mandatory statutory, regulatory, or Executive Order reviews; the quality of the PHA's past performance in implementing development projects under this part; and the PHA's demonstrated administrative capability.

(b) *Project description.* A description of the proposed project, including the proposed development method (e.g., mixed-finance, new construction, acquisition); the household type (e.g., family, elderly); number and type of units (with bedroom breakout and count) of public and nonpublic housing units, if applicable; the method of completing construction, including the extent to which the PHA shall use force account labor and use of procured contractors; schematic drawings of the proposed building and unit plans; and the types and size of nondwelling space to be provided. For new construction projects, the PHA must include determinations required under § 905.602. If the project involves the acquisition of existing properties less

than 2 years old, the PHA must include an attestation from the PHA and owner that the property was not constructed with the intent that it would be sold to the PHA or that the property was constructed in compliance with all applicable requirements (e.g., Davis-Bacon wage rates, accessibility, etc.).

(c) *Site information.* An identification and description of the proposed site, site plan, and neighborhood, and a neighborhood map shall be contained in the development proposal and must meet the site and neighborhood standards required under § 905.602(d).

(d) *Participant description.*

Identification of participating parties and a description of the activities to be undertaken by each of the participating parties and the PHA; and legal and business relationships between the PHA and each of the participating parties, as applicable.

(e) *Development project schedule.* A schedule for the development project that includes each major stage of development through and including the submission of an Actual Development Cost Certificate to HUD.

(f) *Accessibility.* A PHA must provide sufficient information for HUD to determine that dwelling units and other public housing facilities meet accessibility requirements specified at § 905.312, including, but not limited to, the number, location, and bedroom size distribution of UFAS-accessible dwelling units.

(g) *Project costs.*

(1) *Budgets.* The PHA shall submit a budget in the form prescribed by HUD reflecting the total cost from all sources based on the schematic drawings, outline specifications, and construction cost estimate. For mixed-financed projects, the PHA shall submit a budget for the construction period, a draw schedule identifying the timing of construction financing contributions from all sources, and a separate budget showing the permanent financing in the project.

(2) *TDC comparison.* A calculation of the TDC subject to § 905.314.

(3) *Financing.* A PHA must submit a detailed description of all financing necessary for the implementation of the project, specifying the sources. In addition, HUD may require all documents relating to the financing (e.g., loan agreements, notes, etc.) and establishment of project reserves.

(4) *Safe harbor standards.* HUD will review the project terms when receiving development proposals, budgets, and/or other documents that contain negotiated terms. In order to expedite the mixed-finance review process and control costs, HUD may make available safe

harbor and maximum fee ranges for a number of costs. If a project is at or below a safe harbor standard, no further review will be required by HUD. If a project is above a safe harbor standard, additional review by HUD will be necessary. In order to approve terms above the safe harbor, the PHA must demonstrate to HUD in writing that the negotiated terms are appropriate for the level of risk involved in the project, the scope of work, any specific circumstances of the development, and the local or national market for the services provided.

(h) *Operating pro-forma/Operating Fund methodology.* Projects shall submit a 10-year operating pro-forma including all assumptions to assure that operating expenses do not exceed operating income. For mixed-finance development, the PHA must describe its methodology for providing and distributing operating subsidy to the owner entity for the public housing units.

(i) *Local cooperation agreement.* Documentation regarding local cooperation agreement in accordance with 905.602(a) or 905.604(e) for mixed-finance transactions.

(j) *Environmental requirements.* All activities under this part are subject to an environmental review by a responsible entity under HUD's environmental regulations at 24 CFR part 58 and must comply with the requirements of the National Environmental Policy Act of 1969 (NEPA) (42 U.S.C. 4321 *et seq.*) and the related laws and authorities listed at 24 CFR 58.5. HUD may make a finding in accordance with § 58.11 of this title and may perform the environmental review itself under the provisions of 24 CFR part 50. In those cases where HUD performs the environmental review under 24 CFR part 50, it will do so before approving a proposed project, and will comply with the requirements of NEPA and the related requirements at 24 CFR 50.4.

(k) *Relocation.* Information concerning any displacement of the site occupants, including identification of each person displaced, the distribution plan for notices, and anticipated cost and source of funding for relocation assistance in accordance with § 905.308(b)(9). If displacement is due to a HUD-approved demolition or disposition of existing public housing, no submission will be required, since relocation was required to be addressed prior to demolition/disposition HUD approval.

(l) *Market analysis.* For a mixed-finance development that includes nonpublic housing units, the PHA must

include an analysis of the projected market for the proposed project.

(m) *Program income and fees.* HUD will require the PHA to disclose information on program income and fees the PHA or its affiliate or instrumentality receives.

(n) *Additional HUD-requested information.* PHAs are required to provide any additional information that HUD may need to determine whether it can approve the proposal.

§ 905.608 Site or property acquisition proposal.

(a) When a PHA determines that it is necessary to acquire land or property using the Capital Fund for the development of public housing prior to approval of the Development Proposal, the PHA shall submit a site/property acquisition proposal to HUD for review and approval in accordance with 24 CFR 905.610. If site or property will be purchased at closing, then the items stated in paragraphs (e) and (f) of this section need to be included in the development proposal. The acquisition of a site or property for additional public housing is subject to requirements contained in § 905.308(b)(9). The site acquisition proposal shall include the following:

(b) *Justification.* A justification for acquiring property prior to Development Proposal submission.

(c) *Description.* A description of the property (*i.e.*, proposed site or project) to be acquired.

(d) *Project description; site and neighborhood standards.* An identification and description of the proposed project, site plan, and neighborhood, together with information sufficient to enable HUD to determine that the proposed site meets the site and neighborhood standards at § 905.602(d).

(e) *Zoning.* Documentation that the proposed project is permitted by current zoning ordinances or regulations or evidence to indicate that needed rezoning is likely and will not delay the project.

(f) *Appraisal.* Documentation attesting that an appraisal of the proposed property by an independent, state-certified appraiser has been conducted and that the acquisition is in compliance with § 905.308(b)(9). The purchase price of the site/property may not exceed the appraised value without HUD approval.

(g) *Schedule.* A schedule of the activities to be carried out by the PHA.

(h) *Environmental assessment.* An environmental review or request for HUD to perform the environmental review pursuant to § 905.308(b)(2).

(i) *Relocation.* Information concerning any displacement of the site occupants, including identification of each person displaced, the distribution plan for notices, and anticipated cost and source of funding for relocation assistance in accordance with § 905.308(b)(9). If displacement is due to a HUD-approved demolition or disposition of existing public housing, no submission will be required since relocation was required to be addressed prior to HUD approval of the demolition or disposition.

§ 905.610 Technical processing.

(a) *Review.* HUD shall review all development proposals and site/property acquisition proposals for compliance with the statutory, Executive Order, and regulatory requirements applicable to the development of public housing. In addition, HUD shall conduct any necessary statutory and Executive Order reviews with respect to each proposal. For mixed-finance proposals, HUD's review will evaluate whether the proposed sources and uses of funds are eligible and reasonable, and whether the financing and other documentation establish to HUD's satisfaction that the development is viable and structured so as to adequately protect the federal investment of funds in the development. For this purpose, HUD will consider the PHA's proposed methodology for allocating operating subsidies on behalf of the public housing units, the projected revenue to be generated by any nonpublic housing units in a mixed-finance development, and the 10-year operating pro-forma and other information contained in the proposal. If public housing development funds are to be used to pay for more than the pro rata cost of common area improvements, HUD will evaluate the proposal to ensure that:

(1) On a per-unit basis (taking into consideration the number of public housing units for which funds have been reserved) the PHA will not exceed TDC limits; and

(2) Common area improvements will benefit the residents of the development in a mixed-finance project.

(b) *Approval.* If HUD determines that a proposal is approvable, upon approval of the Request for Release of Funds and the environmental certification submitted in accordance with 24 CFR part 58, HUD shall notify the PHA in writing of its approval. The HUD approval will include the CF ACC for signature and return by the PHA for execution by HUD. Until HUD approves a proposal, a PHA may only draw down funds for costs for materials and services related to proposal preparation

and predevelopment costs approved by HUD.

(c) *Amendments to approved development proposals.* The PHA shall amend any approved development proposal to which a material change is made. HUD's review and approval is required for all amendments to approved development proposals. HUD defines a material change as:

(1) A change in the number of units;

(2) A change in the number of bedrooms by an increase/decrease of more than 10 percent;

(3) A change in cost or financing by an increase/decrease of more than 10 percent;

(4) A change in the site; or

(5) A schedule change that results in a PHA's failure to meet obligation and expenditure deadlines.

§ 905.612 Disbursement of capital funds—predevelopment costs.

(a) *Predevelopment Costs.* After inclusion of a new development project in the HUD-approved CFP 5-Year Action Plan and the development has been entered into applicable HUD data systems, the PHA may request funding for predevelopment expenses. Failure to request and obtain HUD approval for predevelopment assistance may result in the costs associated with the new project being deemed ineligible costs. Predevelopment funds may be approved by HUD in accordance with the following requirements:

(1) Predevelopment assistance may be used to pay for materials and services related to proposal development and may also be used to pay for costs related to the demolition of units on a proposed site or for preliminary development work.

(2) For non-mixed-finance projects, predevelopment funding up to 5 percent does not require HUD approval. HUD shall determine on a case-by-case basis that a higher amount that may be drawn down by a PHA to pay for necessary and reasonable preliminary development costs, based upon a consideration of the nature and scope of activities proposed to be carried out by the PHA. For mixed-finance projects, all funding for predevelopment must be reviewed and approved by HUD.

(3) Before a request for predevelopment assistance may be approved, the PHA must provide to HUD information and documentation specified in §§ 905.606 and 905.608 as HUD deems appropriate.

(4) The requirements in § 905.612(b) to disburse funds for mixed-finance projects in an approved ratio to other public and private housing do not apply

to disbursement of predevelopment funds.

(b) *Standard drawdown requirements.*

(1) *General.* If HUD determines that the proposed development is approvable, it may execute with the PHA a CF ACC Amendment, or mixed-finance amendment to the CF ACC, as applicable, to provide funds for the purposes, and in the amounts approved by HUD. Upon approval of the development proposal and all necessary documentation evidencing and implementing the development plan, the PHA may disburse amounts as are necessary and consistent with the approved development and site acquisition proposal without further HUD approval, unless HUD determines that such approval is necessary. Once HUD approves the acquisition plan, the PHA may request funds for acquisition activities. Each Capital Fund disbursement from HUD is deemed to be an attestation of compliance by the PHA with the requirements of this part, as prescribed in § 905.106. If HUD determines that the PHA is in noncompliance with any provision of this part, the PHA may be subject to the sanctions in subpart H, § 905.800 of this part.

(2) *Mixed-finance projects.* Upon HUD approval of final, fully executed and, where appropriate, recorded closing documents submitted pursuant to § 905.604(l), the PHA may disburse funds from HUD only in an approved ratio to other public and private funds, in accordance with a disbursement schedule prepared by the PHA and approved by HUD. The ratio applies to the overall project and not to each drawdown. The PHA will release funds to its partner consistent with § 905.316.

Subpart G—Other Security Interests

§ 905.700 Other security interests.

(a) The PHA may not pledge, mortgage, enter into a transaction that provides recourse to public housing assets, or otherwise grant a security interest in any public housing project, portion thereof, or other property of the PHA without written approval of HUD.

(b) The PHA shall submit the request in the form and manner prescribed by HUD.

(c) HUD shall consider:

(1) The ability of the PHA to complete the financing, the improvements, and repay the financing;

(2) The reasonableness of the provisions in the proposal; or

(3) Any other factors HUD deems appropriate.

Subpart H—Compliance, HUD Review, Penalties, and Sanctions

§ 905.800 Compliance.

As provided in § 905.106, PHAs or other owner/management entities and their partners are required to comply with all applicable provisions of this part. Execution of the CF ACC Amendment received from the PHA, submissions required by this part, and disbursement of Capital Fund grants from HUD are individually and collectively deemed to be the PHA's certification that it is in compliance with the provisions of this part and all other Public Housing Program Requirements. Noncompliance with any provision of this part or other applicable requirements may subject the PHA and/or its partners to sanctions contained in § 905.804.

§ 905.802 HUD review of PHA performance.

(a) *HUD Determination.* HUD shall review the PHA's performance in completing work in accordance with this part at least annually. HUD may make such other reviews when and as it determines necessary. When conducting such a review, HUD shall, at minimum, make the following determinations:

(1) HUD shall determine whether the PHA has carried out its activities under this part in a timely manner and in accordance with its CFP 5-Year Action Plan and other applicable requirements.

(2) HUD shall determine whether the PHA has a continuing capacity to carry out its Capital Fund activities in a timely manner.

(3) HUD shall determine whether the PHA has accurately reported its obligation and expenditures in a timely manner.

(4) HUD shall determine whether the PHA has accurately reported required building and unit data for the calculation of the formula.

(5) HUD shall determine whether the PHA has obtained approval for any CFFP or OFFP proposal and any PHA development proposal.

(b) [Reserved]

§ 905.804 Sanctions.

(a) If at any time, HUD finds that a PHA has failed to comply substantially with any provision of this part, HUD may impose one or a combination of sanctions, as it determines is necessary. Sanctions associated with failure to obligate or expend in a timely manner are specified at § 905.306. Other possible sanctions for noncompliance by the PHA that HUD may impose include, but are not limited to the following:

(1) Issue a corrective action order at any time by notifying the PHA of the specific program requirements that the PHA has violated, and specifying that any of the corrective actions listed in this section must be taken. Any corrective action ordered by HUD shall become a condition of the CF ACC.

(2) Reimburse from non-HUD sources.

(3) Limit, withhold, reduce, or terminate Capital Fund or Operating Fund assistance.

(4) Issue a Limited Denial of Participation or Debar responsible PHA officials pursuant to 24 CFR part 24, subpart J.

(5) Withhold assistance to the PHA under section 8 of the Act, 42 U.S.C. 1437f.

(6) Declare a breach of the CF ACC with respect to some or all of the PHA's functions.

(7) Take any other corrective action or sanction, as HUD deems necessary.

(b) *Right to Appeal*. Before taking any action described in paragraph (a) of this section, HUD shall notify the PHA and provide an opportunity, within a prescribed period of time, to present any arguments or additional facts and data concerning the proposed action to the Assistant Secretary for Public and Indian Housing

PART 941—[REMOVED]

4. Remove part 941, consisting of §§ 941.101–941.616.

PART 968—[REMOVED]

5. Remove part 968, consisting of §§ 968.101–968.435.

PART 969—[REMOVED]

6. Remove part 969, consisting of §§ 969.101–969.107.

Dated: December 23, 2010.

Sandra B. Henriquez,

Assistant Secretary for Public and Indian Housing.

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